

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 714.

O. ITOW AND E. FUSHIMI, PLAINTIFFS IN ERROR,

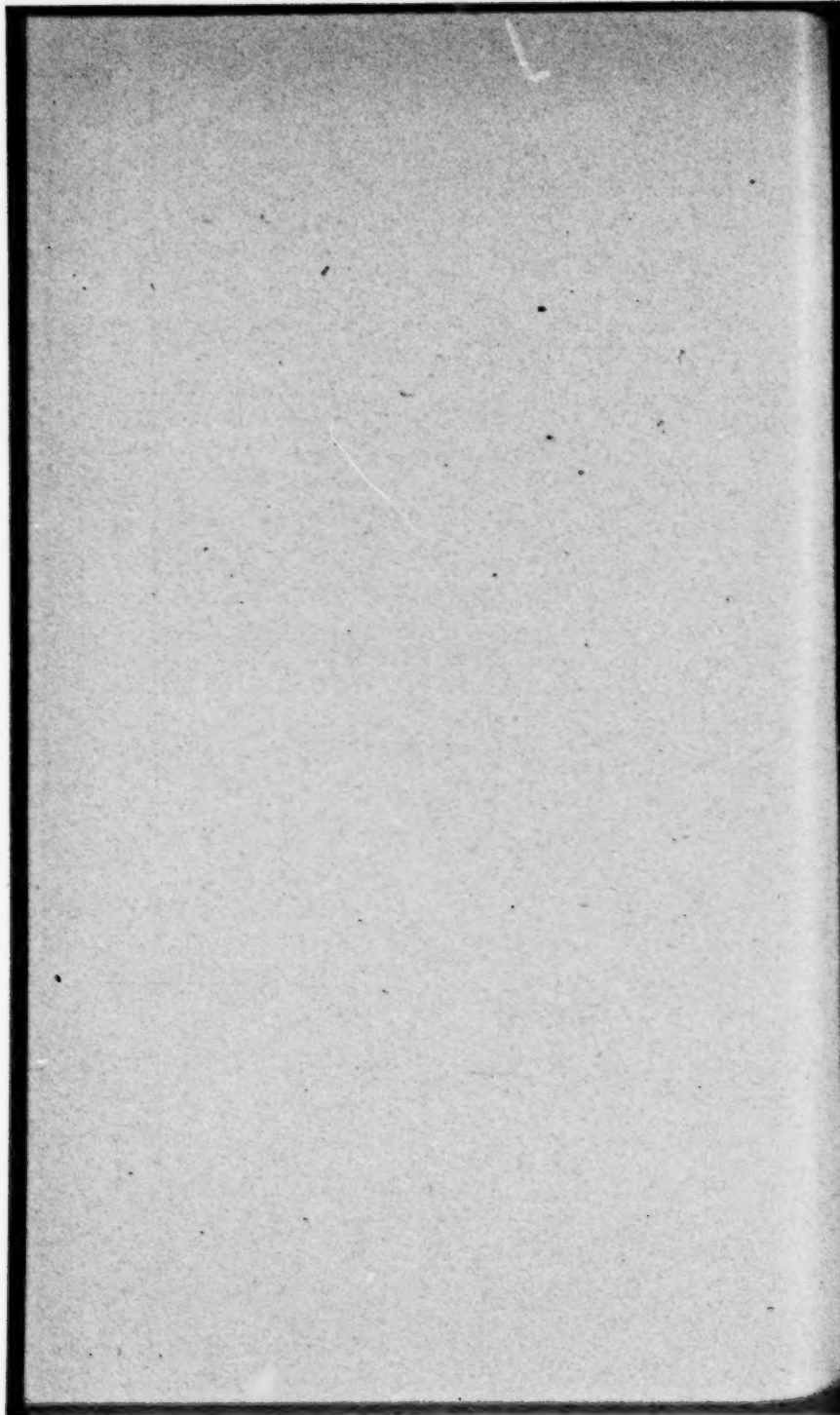
VS.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES,
DIVISION NO. 1, TERRITORY OF ALASKA.

FILED SEPTEMBER 26, 1913.

(23865)



SUPREME COURT OF THE UNITED STATES.

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vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES,
DIVISION NO. 1, TERRITORY OF ALASKA.

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1 District Court for the District of Alaska, Division Number One.

THE UNITED STATES OF AMERICA	} Sec. 3, A. C. C.
vs.	
O. ITOW AND E. FUSHIMI.	

At the special December term of the District Court of the United States of America, within and for the District of Alaska, in the year of our Lord one thousand nine hundred and twelve, begun and held at Juneau in said District, beginning December 9th, A. D. 1912.

The grand jurors of the United States of America, selected, empaneled, sworn, and charged within and for the District of Alaska, accuse O. Itow and E. Fushimi by this indictment of the crime of murder in the first degree, committed as follows:

The said O. Itow and E. Fushimi, at or near Dundas Bay, within said District of Alaska, and within the jurisdiction of this court, on the fourteenth day of July, in the year of our Lord one thousand nine hundred and twelve, being then and there of sound memory and discretion, did purposely, wilfully, unlawfully, maliciously, and feloniously, and of their deliberate and premeditated malice aforethought, kill and murder one Frank Dunn, then and there a living male person, by then and there, with the intent and purpose aforesaid, stabbing and thrusting a sharp steel sword, with a cutting blade twenty-three inches in length and one inch in width, into the left shoulder and into and through the body and trunk of him, the said Frank Dunn, he, the said O. Itow, and he, the said E. Fushimi, by said stab and thrust with said sword, then and there purposely, wilfully, unlawfully, maliciously, and feloniously, and with deliberate
2 and premeditated malice aforethought, as aforesaid, inflicting a mortal wound in and upon the body of him, the said Frank Dunn, of which said mortal wound the said Frank Dunn did then and there die.

And so the grand jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say: That O. Itow and E. Fushimi did then and there commit the crime of murder in the first degree, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

JOHN RUSTGARD,
United States Attorney.

(Endorsed:) Form No. 195. No. 863-B. United States District Court, District of Alaska, First Division. The United States of America *vs.* O. Itow and E. Fushimi. Indictment, violation of sec. 3, A. C. C., murder in the first degree. Secret. A true bill, H. A. Bishop, foreman. Filed this 13th day of December, A. D. 1912. E. W. Pettit, clerk. John Rustgard, U. S. attorney. Witnesses: Henry Adams, John Wick, John Hogan, Henry Otterly, Albert Nelson, Carl Waldall, Manuel Ara, Fernando Costello. Presented by H. A.

Bishop, foreman of the grand jury, in the presence of the grand jury, in open court, and filed in open court with the clerk of the District Court, all on this 13th day of Dec., 1912. E. W. Pettit, clerk.

3 In the District Court for the District of Alaska, Division
Number One, at Juneau.

UNITED STATES	}	No. 863-B.
<i>vs.</i>		
O. ITOW AND E. FUSHIMI.		

Arraignment.

Come now Assistant United States Attorneys Roy V. Nye and H. H. Folsom; come also the defendants in the custody of the United States marshal; and after Kinya Okajima is duly sworn as interpreter herein, the defendants are arraigned by having the indictment read and translated to them by said interpreter, a copy thereof being served upon each defendant in open court. And each defendant being asked by the clerk of the court if he is indicted by his true name, each answers that he is. Whereupon the defendants are asked by the court if they have procured counsel for their defense herein, to which the defendant, O. Itow, replies that J. H. Cobb, Esquire, is his attorney, and the defendant, E. Fushimi, states to the court that he is without counsel, but will procure an attorney to represent him. Thereupon the said defendants are remanded to the custody of the United States marshal and are given until ten o'clock a. m. Monday to enter their pleas herein.

(Dated) Friday, December 13, 1912.

PETER D. OVERFIELD, *Judge.*

4 In the District Court for the District of Alaska, Division
Number One, at Juneau.

UNITED STATES	}	No. 863-B.
<i>vs.</i>		
O. ITOW AND E. FUSHIMI.		

Pleas of "Not guilty."

Comes now H. H. Folsom, assistant United States attorney; come also the defendants, O. Itow and E. Fushimi, into court in the custody of the United States marshal; whereupon the name of J. F. Malony, who is present in court, is entered as associate counsel with J. H. Cobb, Esquire. And after Kinya Okajima is duly sworn as Japanese interpreter herein the defendants and each of them, personally, through the said sworn interpreter, announce their desire to

waive the time heretofore set to enter their pleas herein and state that they desire to plead at this time.

Thereupon the defendant, O. Itow, having on a former day of this term been duly arraigned, is now asked by the clerk of the court, through the sworn interpreter, if he is guilty or not guilty of the crime charged against him in the indictment herein, to which he answers that he is "Not guilty"; whereupon the defendant, E. Fushimi, who was duly arraigned on a prior day of this term, is asked by said clerk, through said interpreter, if he is guilty or not guilty of the crime charged against him in the indictment herein, namely, that of murder in the first degree, to which he answers that he is "Not guilty." Whereupon the trial of this cause is set down to follow the trial of cause 855-B, United States *vs.* Dick Manson, it being understood that, if desired, counsel will be heard relative to a continuance of the trial of this cause, and the defendants are remanded to the custody of the United States marshal awaiting trial herein.

Dated, Saturday, December 14, 1912.

PETER D. OVERFIELD, *Judge.*

5 In the District Court for the District of Alaska, Division
Number One, at Juneau.

UNITED STATES OF AMERICA	} No. 863-B.
<i>vs.</i>	
O. ITOW AND E. FUSHIMI	

Trial.

Now on this day this cause comes on regularly for trial, the plaintiff being represented by John Rustgard, United States attorney; the defendants coming into court in the custody of the United States marshal and being represented by their attorney, J. H. Cobb, Esquire. Whereupon, oral application is made by J. H. Cobb, Esquire, for a continuance of this trial to Monday, January 6, 1913, and said application is by the court denied, the court stating that the defendants will lose no rights in case their witnesses are on the present trip north of the steamer "Northwestern." Thereupon the case goes to trial, and the following persons are drawn and accepted from the regular panel of petit jurors, to wit, Ed Woods, James Fitzgerald, F. A. J. Galwas, C. E. Carpenter.

Whereupon, upon stipulation of counsel for the Government and counsel for the defense, it is ordered that a special venire, returnable at 2.30 p. m. to-day, issue at this time, directed to the United States marshal, to summon from the body of the district and not from the bystanders, fifteen (15) men qualified as jurors to complete the panel therein. Thereupon the following named persons are selected as jurors from the balance of the regular panel of petit jurors, to wit, J. H. King. And John Sloan and Fred Hamburg are

duly sworn as bailiffs, and the court orders that the jurors selected be kept together during the trial of this cause and that they be furnished with suitable means and lodgings by the United States marshal during said time.

6 Whereupon counsel for the defendants again moves for a postponement of this trial on the ground that from information just received, the witnesses for defendants, supposed to be aboard the steamer "Northwestern" on her present trip north, are unable to leave Seattle until to-morrow night on the steamer "Dolphin." And the court, being advised, denies said motion, but requests counsel for defendants to keep the court advised as to the progress of said witnesses.

Thereupon the said marshal, returning the said special venire into court, the following-named persons, to wit, Z. M. Bradford, E. G. Trantow, W. G. Powers, C. F. Cheek, are selected as jurors in this cause. And it appearing to the court that the special venire is exhausted and the trial panel herein still incomplete, it is ordered that the clerk issue a second special venire, returnable at ten o'clock a. m. January 3, 1913, directed to the United States marshal, to summon from the body of the District, and not from the bystanders, fifteen (15) men qualified as jurors to complete the trial panel.

Whereupon, the jurors impaneled are instructed by the court as to their demeanor; W. F. Pendergast is duly sworn as additional bailiff; and at the request of both parties herein, the jury is not kept together and is excused until ten o'clock a. m. to-morrow. Thereupon, the further hearing of this cause is continued to said time. And all petit jurors not engaged in the trial of this cause are excused until Monday, January 6, 1913.

Dated Thursday, January 2, 1913.

PETER D. OVERFIELD, *Judge*.

7 In the District Court for the District of Alaska, Division Number One, at Juneau.

UNITED STATES	} No. 863-B.
<i>vs.</i>	
O. ITOW AND E. FUSHIMI.	

Trial continued.

Now on this day this cause coming on again regularly for trial, comes the United States attorney; come also the defendants into court in the custody of the United States marshal and being represented by their attorney, J. H. Cobb, Esquire; come likewise the jurors heretofore impaneled herein, and being called and each answering to his name, the following proceedings are had, to wit:

Thereupon the United States marshal having returned the second special venire into court, the following-named person, to wit, A. Roche, is selected as a juror herein. And it is ordered that Lloyd

Hill, one of the special veniremen herein, lose his pay as a petit juror for this day for the reason that he failed to appear in court at the hour stated in the special venire.

And it appearing to the court that the second special venire is exhausted and the trial panel herein is not yet complete, it is ordered that the clerk issue a third special venire herein, returnable at two o'clock p. m., directed to the United States marshal to summon from the body of the District, and not from the bystanders, ten (10) men qualified as jurors to complete the panel herein. And the said marshal thereafter returning said special venire into court, the following-named persons, to wit, D. W. Burrige and W. C. Miller, are selected as jurors herein. Whereupon at this time James Fitzgerald, who was heretofore accepted as juror herein, is challenged peremptorily by defendant, with the permission of the court, the prosecution objecting thereto, and said objection being by the court overruled.

8 Thereupon a fourth special venire is ordered issued by the clerk, returnable at four thirty p. m. of this day, directed to the United States marshal, to summon from the body of the District, and not from the bystanders, eight (8) men qualified as jurors to complete the panel herein. And the marshal thereafter returning said venire into court the following-named person, to wit, J. T. Spickett, is accepted as a juror; and it appearing that the trial panel is now complete and the jury being accepted by both parties hereto are sworn to try the issues in this cause.

Thereupon the United States attorney makes an opening statement to the jury, no statement being made on behalf of defendants at this time; and the further trial of this cause is continued until ten o'clock a. m. tomorrow.

Dated Friday, January 3, 1913.

PETER D. OVERFIELD, *Judge*.

UNITED STATES	} No. 863-B.
<i>vs.</i>	
O. ITOW AND E. FUSHIMI.	

Trial continued.

Now on this day this cause comes on again regularly for trial, the plaintiff being represented by the United States attorney, the defendants being present in court in the custody of the United States marshal and represented by their attorney, J. H. Cobb, Esquire, the jury heretofore impaneled and sworn herein coming into court and being called and each answering to his name the following proceedings are had, to wit:

Whereupon the rule is invoked, and all witnesses are excluded from the court room. Thereupon the following-named witnesses for the Government, to wit, Albert Nelson, John Wick, Carl Waldall,

John Hogan, Henry Otterle are called, duly sworn, and testify for and on behalf of the Government; and Manuel Ara is duly
 9 sworn and testifies, partly through the sworn interpreter, Thomas Kennedy, and partly in English, as a witness for the prosecution.

Thereupon Henry Adams is duly sworn and testifies as a witness for the Government. And the further trial of this cause is continued to Monday, January 6, 1913, at ten o'clock a. m., and the jury is excused until said time.

Dated Saturday, January 4, 1913.

PETER D. OVERFIELD, *Judge*.

UNITED STATES OF AMERICA	} No. 863-B.
<i>vs.</i>	
O. ITOW AND E. FUSHIMI.	

Trial continued.

Now on this day this cause comes on again regularly for trial, the defendants being present in court in the custody of the United States marshal, and the plaintiff and defendants being represented by counsel as of Saturday, and the jurors heretofore impaneled and sworn herein are present in court and being called and each answering to his name the following proceedings are had, to wit:

Whereupon United States Marshal H. L. Faulkner is called, duly sworn, and testifies as a witness for the Government. Thereupon Mrs. Lee Pulver is sworn as interpreter of the Spanish language, and Fernando Costello is duly sworn and testifies, through said sworn interpreter, as a witness for the Government, and the Government rests.

Whereupon Carl Waldall is recalled by counsel for defendants for further cross-examination. And upon showing by defendants that their witnesses can not appear until the arrival of the "Dolphin," the trial of this cause is continued until Wednesday, January 8, 1913, at two o'clock p. m., and the trial panel is excused until said time.

Dated Monday, January 6, 1913.

PETER D. OVERFIELD, *Judge*.

10 In the District Court for the District of Alaska, Division Number One, at Juneau.

UNITED STATES	} No. 863-B.
<i>vs.</i>	
O. ITOW AND E. FUSHIMI.	

Trial continued.

This cause coming on regularly again for trial, the plaintiff being represented by the United States attorney; the defendants coming

into court in the custody of the United States marshal and represented by their attorney, J. H. Cobb, Esquire; and the jury heretofore impaneled and sworn in this cause also coming into court, and being called and each answering to his name, the following proceedings are had, to wit:

Upon showing of J. H. Cobb, Esquire, that defendants' witnesses aboard the steamship "Dolphin" have not yet arrived, and upon motion of said J. H. Cobb, Esquire, the trial of this cause is continued to ten o'clock a. m. Friday, January 10, 1913, and the jury herein is excused until said day and hour.

Dated Wednesday, January 8, 1913.

PETER D. OVERFIELD, *Judge.*

UNITED STATES	} No. 863-B.
<i>vs.</i>	
O. ITOW AND E. FUSHIMI.	

Trial continued.

Now, on this day this cause comes on again regularly for trial, the plaintiff being represented by the United States attorney and Assistant United States Attorney H. H. Folsom; the defendants coming into court in the custody of the United States marshal and being represented by their attorney, J. H. Cobb, Esquire; come also the jurors heretofore impaneled and sworn herein, and being called, each answers to his name. Whereupon the following proceedings are had, to wit:

11 Upon the request of J. H. Cobb, Esquire, the jury retire from the court room while said attorney for the defendants presents his oral motion for the dismissal of the jury in this case, which motion is argued by respective counsel; thereupon the jurors return into court and are questioned by the court as to whether they, or any one of them, has at any time read a certain article appearing in the Alaska Daily Dispatch published on the 7th day of January, 1913, and all the jurors indicating that they have not read said article published on said date, the court thereupon denies said motion.

Whereupon, upon the motion of said J. H. Cobb, Esquire, the witness, Albert Nelson, is recalled for further cross-examination; thereupon Kinya Okajima is duly sworn as Japanese interpreter herein, and the witness, K. Ohta, is called, duly sworn, and testifies through said sworn interpreter, as a witness for the defense; and K. Tanamachi is duly sworn and testifies as a witness for the defendants. Whereupon Joe Kem is duly sworn as Chinese interpreter and Go Wong, a witness for defendants, is duly sworn and testifies through said sworn interpreter. Thereupon Nakayami is duly sworn and testifies for and on behalf of the defense through the sworn interpreter, Kinya Okajima. And the trial of this cause is continued to ten o'clock a. m. to-morrow and the jury herein excused until said hour.

Date, January 10, 1913.

PETER D. OVERFIELD, *Judge.*

12 In the District Court for the District of Alaska, Division
Number One, at Juneau.

UNITED STATES	}	No. 863-B.
<i>vs.</i>		
O. ITOW AND E. FUSHIMI.		

Trial continued.

Now on this day this cause comes on again regularly for trial; the Government being represented by John Rustgard, United States attorney; the defendants being present in court in the custody of the United States marshal and represented by their attorney, J. H. Cobb, Esquire; the jury heretofore impaneled and sworn herein likewise being present in court and being called and each juror answering to his name, the following proceedings are had, to wit:

Whereupon W. Nakayami is recalled and testifies as a witness for the defendants.

Thereupon, upon motion of the United States attorney, the attorney for defendants objecting thereto, the Government is allowed to reopen its case in chief at this time, and Kinya Okajima and I. S. Liebhardt are duly sworn and testify as witnesses for the prosecution. Whereupon K. Tanamachi is recalled and further testifies as a witness for defendants. Thereupon Kinya Okajima is recalled as a witness for the Government, and after the reading of Exhibit No. 4 of plaintiff by the United States attorney, the Government rests its case.

Whereupon E. Fushimi is called, duly sworn, and testifies for and on behalf of the defense. And the trial of this cause is continued until ten o'clock a. m. Monday, January 13, 1913, and the jury are excused until said day and hour.

Dated Saturday, January 11, 1913.

PETER D. OVERFIELD, *Judge.*

13 In the District Court for the District of Alaska, Division
Number One, at Juneau.

UNITED STATES	}	No. 863-B.
<i>vs.</i>		
O. ITOW AND E. FUSHIMI.		

Trial continued.

Now on this day this cause comes on again regularly for trial; the plaintiff and defendants being represented by counsel as of yesterday; and come the defendants into court in the custody of the United States marshal; come likewise the jury heretofore impaneled and sworn herein, and being called and each answering to his name, the following proceedings are had, to wit:

Whereupon E. Fushimi is recalled and further testifies through the sworn interpreter, Kinya Okajima, as a witness for the defense; and the defendant, O. Itow, is called, duly sworn and testifies as a

witness for defendants through the said sworn interpreter; and the defense rests.

Thereupon the following-named witnesses for the Government to wit, Albert Nelson, Carl Waldall, and Henry Adams, are recalled and testify in rebuttal; and both sides rest.

Whereupon, after arguments had by counsel for the prosecution and counsel for the defense, the court instructs the jury as to the law in the premises; and John Sloan, Fred Hamburg, and W. F. Pendergast being duly sworn as bailiffs, the jury retire in charge of their sworn bailiffs for deliberation. And the United States marshal is ordered to furnish meals to the jury and bailiffs.

And thereafter returning into court, and being called and each juror answering to his name, the jury present through their foreman their verdict in this cause, which verdict is in words and figures as follows, to wit:

14 "In the District Court for the District of Alaska, Division
Number One, at Juneau.

"THE UNITED STATES OF AMERICA	} No. 863-B. Special December, 1912, term.
" <i>vs.</i>	
"O. ITOW AND E. FUSHIMI.	

"*Verdict.*

"We, the jury duly empaneled, selected, sworn, and charged to try the issues in the above-entitled case, find the defendants, O. Itow, guilty as charged in the indictment, and E. Fushimi guilty of manslaughter.

"C. F. CHEEK, *Foreman.*"

And said verdict is ordered filed and entered by the clerk. The special veniremen herein are excused for the term and all petit jurors on the regular panel are excused until 10 o'clock a. m. to-morrow. And the defendants are remanded to the custody of the United States marshal awaiting sentence.

Dated Monday, January 13, 1913.

PETER D. OVERFIELD, *Judge.*

15 In the District Court for the District of Alaska, Division
Number One, at Juneau.

THE UNITED STATES OF AMERICA	} No. 863-B. Special December, 1912, term.
" <i>v.</i>	
O. ITOW AND E. FUSHIMI, DEFEND- ants.	

Verdict.

We, the jury duly empaneled, selected, sworn, and charged to try the issues in the above-entitled case find the defendants O. Itow,

guilty as charged in the indictment, and E. Fushimi guilty of manslaughter.

C. F. CHEEK, *Foreman*.

(Endorsed:) Filed Jan. 13, 1913. E. W. Pettit, clerk.

16 In the District Court for the District of Alaska, Division Number One, at Juneau.

UNITED STATES OF AMERICA, PLAINTIFF,	}	No. 863-B.
<i>vs.</i>		
O. ITOW AND E. FUSHIMI, DEFENDANTS.		

Judgment and sentence of E. Fushimi.

Comes now the United States attorney; comes also the defendant E. Fushimi into court in the custody of the United States marshal and being represented by his attorney, J. H. Cobb, Esquire; and the said defendant having on a prior day of this term been convicted by a jury of the crime of manslaughter, and this being the time set for sentence; upon Frank Hermit being duly sworn as Japanese interpreter herein, the court, through said interpreter, informs the said defendant as to its ruling on the motion of defendant for a new trial in the above-entitled cause; and said defendant being asked, through said interpreter, if he has anything to say why the judgment and sentence of the court should not now be pronounced against him, and giving no legal or sufficient excuse in that behalf;

It is, therefore, the judgment and sentence of the court that you, E. Fushimi, be taken by the United States marshal for division number one of the District of Alaska, to the United States penitentiary at or on McNeils Island, in the State of Washington, and that you be there imprisoned in said penitentiary for the period of twenty (20) years, and that you stand committed until this sentence is carried into effect.

Done in open court this 11th day of February, 1913.

PETER D. OVERFIELD, *District Judge*.

17 In the District Court for the District of Alaska, Division Number One, at Juneau.

UNITED STATES OF AMERICA, PLAINTIFF,	}	No. 863-B.
<i>vs.</i>		
O. ITOW AND E. FUSHIMI, DEFENDANTS.		

Judgment and sentence of O. Itow.

This day having heretofore been fixed by the court as the day upon which judgment and sentence would be rendered against the

defendant, O. Itow, upon the verdict of the jury, heretofore returned, whereby the said defendant was and is found guilty of the crime of murder in the first degree, as charged in the indictment herein, and without any qualification of said verdict with reference to capital punishment; the said defendant being present in court in the custody of the United States marshal and being represented by his counsel, J. H. Cobb, Esquire, the United States being represented by the United States attorney for division number one of the District of Alaska; upon Frank Hermit being sworn as Japanese interpreter herein, the court, through said interpreter, informs said defendant as to its ruling upon the motion of defendant for a new trial in the above-entitled cause, denying the said motion; and the defendant being asked by the court, through said sworn interpreter, if he has anything to say why the judgment and sentence of the court should not now be pronounced against him, and answering nothing in that behalf; and the court being fully advised in the premises,

It is now considered and adjudged, and it is the judgment and sentence of the court, that you, O. Itow, be taken by the United

States marshal for division number one, of the District of
18 Alaska, and confined in the Federal jail at Juneau, Alaska, until the 22nd day of March, 1913; and that on that day you be taken by the said United States marshal to a convenient place, theretofore duly prepared in said town of Juneau, and there hanged by the neck until you be dead.

Done in open court this 11th day of February, 1913.

PETER D. OVERFIELD, *District Judge.*

19 In the District Court for Alaska, Division No. One, Juneau.

UNITED STATES OF AMERICA, PLAINTIFFS, }

vs.

O. ITOW AND E. FUSHIMI, DEFENDANTS. }

Order extending time to settle bill of exception.

Upon application of Mr. J. H. Cobb, attorney for the defendants,

It is ordered that time for settling the bill of exceptions herein be, and the same is hereby, extended to March 15th, 1913.

Done in open court, this February 24th, 1913.

PETER D. OVERFIELD, *Judge.*

(Endorsed:) Entered Court Journal. No. D, page 385. Filed Feb. 24, 1913. E. W. Pettit, clerk. By ———, deputy. In the District Court for Alaska, Division No. One, at Juneau. United States of America, plaintiffs, vs. O. Itow and E. Fushimi, defendants. Order extending the time to settle bill of exception.

inherent proving power that may belong to it. In weighing the defendants' testimony you are to be guided by the same rules that should guide you in weighing the testimony if any other witness, taking into consideration their interest in the result, the probability or the improbability of the facts they state, and whether it is corroborated by the other proven circumstances in the case."

Sixth. The court erred in refusing the following instructions to the jury requested by defendants, to wit:

22 "Before the jury can convict the defendants every member of the jury must be satisfied beyond a reasonable doubt of their guilt.

"The burden in upon the Government and it is the duty of the Government to show beyond all reasonable doubt and to the exclusion of every other hypothesis every circumstance necessary to show that the defendants are guilty as charged; and unless the Government has done that in this case it is your duty to acquit. Before you can convict you must be satisfied to a moral certainty not only that the proof is consistent with the guilt of the defendants, but that it is wholly inconsistent with any other rational conclusion."

Seventh. The court erred in refusing the following instructions to the jury requested by defendants, to wit:

"You are instructed that the killing of a human being is justifiable when committed to prevent the commission of a felony upon the person of the slayer or upon his servant or in the lawful attempt to suppress a riot or preserve the peace. So in this case if you find and believe from the evidence that the deceased, Frank Dunn, was attempting to commit a felony upon the persons of Nakayama and Fushimi, and that Itow was the foreman in charge of said Nakayama and Fushimi, and that in the attempt on the part of Itow to prevent the commission of such felony, the deceased was killed; or if you have a reasonable doubt as to whether the deceased did not lose his life in that way then you must acquit.

"It would also be your duty to acquit if you believe that at the time Itow reached the scene of the fatality there was a riot in progress or a breach of the peace was taking place and Itow was making a lawful attempt to suppress such a riot or preserve the peace or if you have a reasonable doubt as to whether the killing did not so occur in either case the defendants are not guilty."

23 Eighth. The verdict of the jury is contrary to the law, the instructions of the court, and the evidence in this; the jury found the defendant, Itow, guilty of murder in the first degree and the defendant, Fushimi, guilty of manslaughter only; yet under the evidence if Fushimi was guilty at all he was guilty of murder in the first degree and under the evidence and the instructions of the court unless Fushimi was guilty of murder in the degree Itow would not be guilty of any greater crime than manslaughter.

And for the said errors and other manifest of record the defendants pray that the judgment and sentence of the District Court for Alaska, Division No. One, be set aside and a venire de novo awarded.

J. H. COBB,

Attorney for Defendants.

(Endorsed:) Filed February 24, 1913. E. W. Pettit, clerk. In the District Court of Alaska, Division No. One, at Juneau. United States of America, plaintiffs, vs. O. Itow and E. Fushimi, defendants. Assignment of errors.

24 In the District Court for Alaska, Division No. One, at Juneau.

UNITED STATES OF AMERICA, PLAINTIFFS,	}
<i>vs.</i>	
O. ITOW AND E. FUSHIMI, DEFENDANTS.	}

Petition for writ of error.

O. Itow and E. Fushimi, defendants in the above-entitled cause, feeling themselves aggrieved by the verdict of the jury and the judgment and sentence of the court entered and pronounced on the 11th day of February, come now, by their attorney, and petition said court for an order allowing them to prosecute a writ of error to the honorable the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, and also for an order staying all proceedings herein until the determination of said writ of error by the said Supreme Court.

And your petitioners will ever pray, etc.

J. H. COBB,

Attorney for Defendants.

(Endorsed:) Filed Feb. 24, 1913. E. W. Pettit, clerk. In the District Court for Alaska, Division No. One, at Juneau. United States of America, plaintiffs, vs. O. Itow and E. Fushimi, defendants. Petition for writ of error.

25 In the District Court for Alaska, Division No. One, at Juneau.

UNITED STATES OF AMERICA, PLAINTIFFS,	}
<i>vs.</i>	
O. ITOW AND E. FUSHIMI, DEFENDANTS.	}

Order allowing writ of error.

Upon motion of Mr. J. H. Cobb, attorney for defendants, and upon the filing of a petition for a writ of error, and on assignment of

errors, it is ordered that a writ be, and the same is hereby, allowed to have reviewed in the honorable the Supreme Court of the United States the judgment and sentence herein, and that said writ of error operate as a supersedeas herein from and after the teste and service thereof.

PETER D. OVERFIELD, *Judge*.

(Endorsed:) Entered Court Journal No. D, page 384-5. Filed Feb. 24, 1913. E. W. Pettit, clerk. In the District Court for Alaska, Division No. One, at Juneau. United States of America, plaintiff, vs. O. Itow and E. Fushimi, defendants. Order allowing writ of error.

26 In the District Court for Alaska, Division No. One, at Juneau.

UNITED STATES OF AMERICA, PLAINTIFFS,	}
<i>vs.</i>	
O. ITOW AND E. FUSHIMI, DEFENDANTS.	

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States District Court, for the Territory of Alaska, Division No. One, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court before you or some you, between the United States, plaintiffs, and O. Itow and E. Fushimi, defendants, a manifest error hath happened to the great prejudice and damage of O. Itow and E. Fushimi, as is said and appears by the petition herein.

We, being willing that error, if any hath been done, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States Supreme Court, in the city of Washington, D. C., together with this writ, so as to have the same at the said place within thirty days from the date hereof, that the record and proceedings aforesaid, being duly inspected, the said Supreme Court may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

27 Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 24th day of February, 1913.

Attest my hand and the seal of the United States District Court, for the Territory of Alaska, Division No. One, at the clerk's office at Juneau, Alaska, on the day and year last above written.

[SEAL.]

E. W. PETTIT,

*Clerk United States District Court,
for the Territory of Alaska.*

Allowed this 24th day of February, 1913.

PETER D. OVERFIELD,

*Judge of the United States District Court,
for the Territory of Alaska.*

Filed Feb. 24, 1913.

E. W. PETTIT, *Clerk.*

By ————, *Deputy.*

28 (Indorsed:) Original. In the District Court for Alaska, Division No. One, at Juneau. United States of America, plaintiff, vs. O. Itow and E. Fushimi, defendants. Writ of error.

28-A In the District Court for Alaska, Division No. One, at Juneau.

UNITED STATES OF AMERICA, PLAINTIFFS. }

vs.

O. ITOW AND E. FUSHIMI, DEFENDANTS. }

Order extending time to file transcript in the Supreme Court.

Upon application of Mr. J. H. Cobb, attorney for the defendants,

It is ordered that the time for filing the transcript of the record in the writ of error herein be, and the same is hereby, extended to May 1st, 1913.

Done in open court, this February 24th, 1913.

PETER D. OVERFIELD, *Judge.*

(Endorsed:) Entered Court Journal No. D, page 384. Filed Feb. 24, 1913. E. W. Pettit, clerk. In the District Court for Alaska, Division No. One, at Juneau. United States of America, plaintiffs, vs. O. Itow and E. Fushimi, defendants. Order extending time to file transcript in the Supreme Court.

29 In the District Court for Alaska, Division No. One, at Juneau.

UNITED STATES OF AMERICA, PLAINTIFFS. }

vs.

O. ITOW AND E. FUSHIMI, DEFENDANTS. }

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the United States, and John Rustgard, United States district attorney for the Territory of Alaska, Division No. One, greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court, to be held at the city of Washington,

D. C., within thirty days from the date of this writ, pursuant to a writ or errors filed in the clerk's office in the District Court for the Territory of Alaska, Division No. One, wherein O. Itow and E. Fushimi are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court for the United States of America, this the 24th day of February, 1913, and of the independence of the United States for one hundred and thirty-six.

[SEAL.]

PETER D. OVERFIELD,
*Judge United States District Court of the
Territory of Alaska, Division No. One.*

Attest:

E. W. PETTIT, *Clerk.*

30 Due service of the within citations admitted this 24th day of Feby., 1913.

JOHN RUSTGARD, *U. S. Atty.*

Filed Feb. 24, 1913.

E. W. PETTIT, *Clerk.*

By ————, *Deputy.*

31 (Indorsed:) Original. In the District Court for Alaska, Division No. One, at Juneau. United States of America, plaintiffs, vs. O. Itow and E. Fushimi, defendants. Citation.

32 In the District Court for Alaska, Division No. 1. at Juneau.

UNITED STATES, PLAINTIFFS,

vs.

O. ITOW AND E. FUSHIMI, DEFENDANTS. }

Order.

Because it appears to the court that the court reporter will be unable to complete the extension of his shorthand report of the trial prior to about April 1st next, so as to enable the court to settle a correct bill of exceptions herein.

It is ordered that the time for settling the bill of exceptions herein be, and the same is hereby, extended to April 15th, 1913, and the time for filing the transcript of the record in the Supreme Court is extended to June 15th, 1913.

Done in open court, this March 4th, 1913.

PETER D. OVERFIELD,
District Judge presiding at Juneau.

(Endorsed:) Entered Court Journal No. D, page 389. Filed March 4, 1913. E. W. Pettit, clerk. No. ——. In the District

Court for Alaska, Division No. 1, at Juneau. United States, ptffs. vs. O. Itow and E. Fushimi, Defts. Order.

33 In the District Court for Alaska, First Division, at Juneau.

UNITED STATES, PLAINTIFFS,	} 863-B.
<i>vs.</i>	
O. ITOW AND E. FUSHIMI, DEFENDANTS.	

Order extending time to settle the bill of exceptions and to file transcript.

The time to settle the bill of exceptions in this case having heretofore been extended to and including this date, and the court reporter not having yet completed the extension of his shorthand report of the evidence, so as to permit the settling of the bill under the rules of court, and there being a necessity for a further extension of time,

It is ordered that the defendants' counsel be, and he is hereby, allowed until and including June 1st, 1913, in which to prepare and present for settlement and allowance herein a bill of exceptions; and the return day of the writ of error herein and the filing of the transcript of the record in the Appellate Court is hereby extended to, and including, the first day of August, 1913.

Done in chambers this 15th day of April, 1913.

PETER D. OVERFIELD, *Judge.*

(Endorsed:) Filed in the District Court, Territory of Alaska, Third Division, April 16, 1913. Angus McBride, clerk, by Thos. S. Scott, deputy. Filed District Court, District of Alaska, Division No. One, April 23, 1913. E. W. Pettit, clerk. Entered Court Journal No. C2, page No. 28. Entered Court Journal No. D, page 407, at Juneau.

34 In the District Court for Alaska, Division No. 1, at Juneau.

UNITED STATES, PLAINTIFFS,	}
<i>vs.</i>	
O. ITOW AND E. FUSHIMI, DEFENDANTS.	

Order.

The Hon. Peter D. Overfield, the judge before whom the above-entitled cause was tried, having heretofore made an order extending time for settling the bill of exception herein to June 1st, 1913, and it appearing that Judge Overfield is detained on official business in the third division and will not arrive in Juneau until after June 1st, 1913,

It is ordered that the said time be now further extended until and including the 15th day of June, 1913.

Dated this May 31st, 1913.

ROBERT W. JENNINGS, *Judge.*

(Endorsed:) Entered Court Journal No. D, page 412. Filed May 31, 1913. E. W. Pettit, clerk, by H. Malone, deputy. In the

District Court for Alaska, Division No. 1, at Juneau. United States. plaintiffs, vs. O. Itow and E. Fushimi, defendants. Order.
(O. K. Rustgard.)

35 In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

UNITED STATES OF AMERICA	} No. 863-B.
<i>vs.</i>	
O. ITOW AND ED. FUSHIMI, DEFENDANTS.	

Transcript of testimony.

Be it remembered that on this 2d day of January, 1913, the above-entitled matter came on for trial at Juneau, Alaska, the honorable Peter D. Overfield presiding, before a jury of twelve men, tried and true; John Rustgard, Esq., United States attorney, appearing for the Government, and John H. Cobb, Esq., appearing for the defendants. Whereupon the following proceedings were had, to wit:

36

JANUARY 2, 1913.

Court convened at ten o'clock a. m., whereupon the following proceedings were had:

Mr. COBB. If the court please, I will ask that the case go over until Monday to have the witnesses here. The marshal, under date of December 30th, received this telegram:

"PORTLAND, OREGON.

"UNITED STATES MARSHAL, *Juneau, Alaska.*

"Two witnesses leave for Seattle to-night. Wash-out between here and Seattle. If able get through will leave Seattle Tuesday, thirty-first, on steamer 'Northwestern.'

"SCOTT, *Marshal.*"

I presume this morning if he hasn't heard anything further they would have caught the "Northwestern," or would have wired from Seattle. The "Northwestern," is due here tomorrow night, but it is doubtful whether could get here or will be in here before tomorrow night; sometimes makes it in two days, not over, at any time, three days. The marshal on the 31st hadn't heard. I caused telegrams to be sent there to the Japanese contractor inquiring particularly where these people were, whether they could serve them, could supplement the marshal's office. Up to the time I came up this morning I hadn't got a return from that telegram. I think likely all witnesses will be here tomorrow.

The COURT. I think better go ahead and choose the jury. If it takes longer than—

Mr. COBB. This is an important case to the defendant. If go ahead and get the jury if anything should turn up puts us in

27 a very bad position. I understand there are a number of cases here to occupy the court between now and Monday, and to start in with a case without a witness on the ground for the defendants is—I have never known it to be done in a case of this importance.

The COURT. Well, we have arranged our calendar so we can take up other cases, and I am afraid if we take it up on Monday that will disarrange the calendar entirely.

Mr. RUSTGARD. I will state to the court that I have excused all the witnesses except in this case and the transportation case. I am satisfied that there is no chance to take them up.

The COURT. If your witnesses have left on the "Northwestern" their rights will be protected; if there is an unforeseen delay, we will take that into account; if the "Northwestern" is delayed we will take that into account.

Mr. COBB. I am laying before the court all the information I have on the subject. If we go ahead and empanel a jury today and take the Government's evidence, why when we get through then be up to us to go ahead with the defense.

The COURT. Not necessarily.

Mr. COBB. Suppose this wash-out that the marshal mentions—that the witnesses didn't catch the boat. Now, the district attorney's statement that he has discharged his witnesses is something that the defendants cannot be held for. The district attorney has enough experience in court to know that there is just a probability of this sort of case coming up.

Mr. RUSTGARD. I will ask to go ahead with the case.

Mr. COBB. I will ask that time be given.

38 The COURT. We are ready to go on with the trial.

Mr. COBB. I would like an opportunity to make a showing. To put it on record. It is a very important matter to the defendants.

The COURT. You can put in on record, but we will go ahead with the case. I will allow you to put in on record after it has been submitted, of course, as to what it was up to this time.

Mr. COBB. The court allows us to make a showing at this time.

The COURT. Not any more than I have said.

Mr. COBB. Exception.

The COURT. Call the jury.

CLERK. Ed. Woods, Joseph Beauchamp, C. A. Hopp, L. T. Merry, Frank Wilson, James Fitzgerald, W. S. Elwell, S. S. Yeomans, F. A. J. Gallwas, Ben Leaming, Walter Bathe, C. E. Carpenter. I will swear Mr. Gallwas for the term. [Mr. Gallwas sworn as juror at this term.] The balance of the panel will rise and be sworn as to their qualifications in this case. [Swears the panel.]

Q. (By Mr. RUSTGARD.) Mr. Gallwas, you haven't served this term before?

A. No, sir.

Q. You may be seated. I want to ask you a few questions. Are you a citizen of the United States?

A. Yes, sir.

Q. Over twenty-one years of age?

A. Yes, sir.

Q. A resident of the District of Alaska?

A. Yes, sir.

Q. Never been convicted of a felony?

39 A. No, sir.

Q. Possessed of all your natural senses—hearing and sight,
and so on?

A. Yes, sir.

Mr. RUSTGARD. Qualified.

Q. (By Mr. Cobb.) Mr. Beauchamp. How do you spell it?

A. B-e-a-u-c-h-a-m-p.

Q. Where do you reside, Mr. Beauchamp?

A. Skagway.

Q. Skagway. How long have you resided in Alaska?

A. Oh, about fourteen years.

Q. Have you been in Juneau ever since the beginning of this term?

A. Yes, sir.

Q. Since you have been here have you read the daily papers published here?

A. Not very much.

Q. Have you ever heard anything about this case?

A. No, sir.

Q. Or read anything in the papers regarding it?

A. No, sir.

Q. Neither before nor since you have been here?

A. No, sir.

Q. You know what case I refer to?

A. I know it is.

Q. It is the case against Itow and Fushimi, two Japanese?

A. Yes, sir.

Q. Did you read anything about the case in the papers last summer?

A. No, sir.

40 (Whereupon the juror was further examined on his voir dire; thereupon Mr. C. A. Hopp, Mr. L. T. Merry, Mr. Frank Wilson, Mr. James Fitzgerald, Mr. S. H. Yeomans, Mr. Ed. Woods, Mr. Walter Bathe, Mr. Ben Leaming, Mr. Gallwas, Mr. C. E. Carpenter, Mr. Elwell were examined upon their voir dire as to their qualifications to serve as jurors. Whereupon J. H. King, J. J. Kaskakoff, W. H. McBlaine, and Harry Ashball were called to the jury box.)

The COURT. At the suggestion of counsel, which I consider a good one to save time, if the attorneys are willing, at this time I would issue a special venire.

Mr. RUSTGARD. We don't know, of course, how many we need until we proceed with the four.

The COURT. Evidently need four.

Mr. RUSTGARD. I am willing now that the court may issue a special venire for possibly fifteen.

The COURT. The attorneys desire it at this time?

Mr. COBB. I think that would be better.

The COURT. How many do you suggest?

Mr. COBB. I suggest fifteen.

The COURT. Think that would be sufficient?

Mr. COBB. I doubt if that would be sufficient.

The COURT. Special venire may issue to summon fifteen jurors into court at two o'clock.

The MARSHAL. Can you make it half past two?

The COURT. At half past two. Proceed.

(Whereupon the last four jurors called to the box were examined upon their voir dire as to their qualifications.)

The COURT. It is my opinion, gentlemen of the jury, that in
41 a murder case, which this is, it is necessary to keep the jury together during the trial of the case, and although you are kept together you should remain toward the case exactly the same as though you were separate when you leave the box in this respect; you ought not, because you are kept together, commence and discuss the case. You can see the reason for that. If you should commence expressing opinions even right now with the little you know about it, the chances are you are apt to form an opinion of it in some of your minds, might be quite an opinion before you hear it, and try to decide it before you hear the evidence. For that reason I ask you not to mention the case. Keep your minds absolutely free so you will be able to accept freely and readily the evidence that will be given here in the case and thereon form your verdict on the instructions of the court. While you will be kept together some days, so far as possible for the judge of the court to do, I will allow you any and all privileges that are consistent with the purpose of the trial of a case of this sort.

(Whereupon court took a recess until two o'clock p. m. of this same day, at which time court reconvened, the parties being present as heretofore, and further proceedings were had, to wit:)

Mr. COBB. I desire at this time—this morning it came on informally—to renew the application for the postponement of this case. I will state quite lately and since the preparation of this, I did it upon adjourning court and after the receipt of the telegram, I advised Mr. Okajima that these witnesses would all be on the “Dolphin;” that these, the three witnesses would be on the “Dolphin;” that is what they ask; from that I take from that that the marshal
42 from Portland didn't get through on account of the wreck and the witnesses won't be here under that statement before Tuesday evening of next week.

The COURT. Who is the telegram from?

Mr. COBB. From the Japanese contractor there, Mr. Krotarki. The first clause of it has no bearing on the matters here and I have not kept it in.

The COURT. Three of them?

Mr. COBB. The three witnesses leave to-morrow "Dolphin." The substance of it is the same as I stated this morning. I don't think these men should go to trial until their counsel has had an opportunity at least to see their witnesses. We are assured we will have them here at the trial.

The COURT. We will proceed with the empanelling of the jury. I shall say this to you that I shall want to be kept notified whether these witnesses do take the vessel at all or not. If they do why then may make some difference with the progress of the trial.

Mr. COBB. I have asked the marshal to telegraph down and to get definite notice of whether they sail.

The COURT. If you will notify me of the progress then I will take that into consideration.

Mr. RUSTGARD. The progress of the trial will probably last until then anyhow.

Mr. COBB. The application then will be denied and we will take an exception.

The COURT. Exception allowed to the ruling of the court as made.

(Whereupon Tom Tracey, Amos Benson, F. Hillebrand, 43 Z. M. Bradford, M. C. Stewart, John Wagner, C. Reilly, E. G. Trantow, Alex White, F. Wolland, Dan Kennedy, John Wahl, and C. F. Cheek and M. D. Bothwell were examined upon their voir dire to serve as jurors in the case; whereupon the court directed a special venire to issue for fifteen qualified jurors from the body of the district.)

The COURT. In the meantime I will have to say to the gentlemen in the box that it is important while you are being kept together that you do not discuss this case. Very often it is only natural in a matter of this sort that you would commence talking about it in a general way, and it might on very little evidence, very little thought, very little impression, and still if you continue to discuss it of course a man will have stronger opinions according to his natural habits, and so forth. It would often happen, therefore, if nine men were discussing a subject such as this, even before any witnesses come upon the stand, it would lead to strong opinions which might be very unjust to the defendants or might be very unjust to the prosecution. For that reason I ask you particularly in this case not to allow yourselves to discuss this case at all among yourselves until you have completed the hearing, as it is your duty as jurors, of the evidence in this case of the testimony in court. It is customary and probably wise in cases of this sort, of this importance, for jurors to be kept together. It is not the desire of the court to make your stay together unpleasant: make it just as pleasant for me to you as a presiding officer of the court under the law, and I will ask you to make it as pleasant as you can for the bailiffs who have you in charge.

44 Anything that is within reason that I can allow them to furnish you or to do for you, I will very gladly order done for

you, and if you will ask through them, why I shall reply through them and make it as pleasant for you as possible. [Whereupon the jury was excused and thereafter called back to the court room.] Gentlemen, I have always been under the impression and was this morning that our code specifically provided that in cases of this sort the jurors must be kept together. In attempting to find that act I didn't find it, nor have the attorneys for the parties here interested been able to find it, so I am under the impression that there is no specific statute providing that the jury must be kept together; in other words, it is discretionary, and that is probably the reason I have always kept jurors together; that it has been requested by one side or the other. Now, it seems in this case the attorneys are perfectly willing that you gentlemen shall not be held together during the trial of the case. It is the desire of the attorneys and of the court, too, that you be very careful and circumspect as jurors so that no criticism can fall upon the trial court of which you are a party in this case, afterwards so that no matter what your verdict might be when you get through the case no court will have any reason to say there was some irregularity or some error by reason of the jurors being allowed to go home, and therefore I want the jury to bear that in mind, and we can give effect to the law.

Mr. Cobb. I think the court should further instruct them, I think it has been done, if anybody attempts to discuss it around either in town or elsewhere, should report it.

45 The Court. I have always said this to juries, and it is the one instance I didn't think to do it; that is, men oftentimes will, inadvertently and without any desire to do wrong, probably commence talking about a case that is on trial in this court, not knowing that you gentleman might be jurors in the case; sometimes it is not quite as innocent as all that; some men will attempt to feel another out, or work on a man and effect him. If anyone does that wilfully, of course, they are paying a very small tribute to a juror's intelligence. It ought to be resented, and I think it would be resented by any juror, and, of course, it would be summarily punished by this court if known. It therefore becomes your duty to carry yourselves in such a way that you can not be criticized, and if one should attempt to talk to you about this case in any shape, manner, or form, the only manly way, the only way known to the court you could follow yourselves and put the court in proper position, would be to just inform me; come to me privately in my chambers there at any time and let me know, and let me know instantly if anything should happen during the trial of this case. If it should happen this person were in a restaurant, cigar store, or public place, where probably would have just as much right as you and talks to you about the case, might be as well for you to go about your business, and if they should then and there and were bound to talk about the case, even though you had equal rights, best for you to notify me. I doubt, though, that any person, woman, man or child, would talk to you if

they knew you were jurors. If, on the other hand, you happen to be in a place where they were talking about this case and they
46 had superior rights to yourself, and they had a right to be there, and you had no right, but just looking on, better to say you are a juror and walk away. I think that covers the ground, so you will understand the spirit of the court and your duties and obligations and the respect that should be paid to you as jurors. You may adjourn until ten o'clock to-morrow morning.

(Whereupon court took a recess until ten o'clock a. m., January 3, 1913, at which time court again reconvened, the parties being present as heretofore, and the jury thus far accepted being in the box, and further proceedings were had, to wit:

Whereupon Gudmund Jensen, J. F. Malloy, R. M. Halley, Lloyd Hill, W. W. Taylor, J. E. Currier, J. Williams, F. M. Harvey, John P. Benson, W. E. Kendrick, Joseph Patten, A. Roche, H. J. Maycock, P. J. Wiley, Louis Lund were examined upon their voir dire as to their qualifications as jurors.

Whereupon court took a recess until two o'clock p. m. of the same day, at which time further proceedings were had, to wit:

Whereupon D. W. Burrridge, W. S. George, E. P. Pond, John Kennedy, W. C. Miller, L. P. Lindahl, H. T. Tripp, J. H. Harrison, J. A. McKenna, W. R. Wills were examined upon their voir dire as to their qualifications as jurors.)

The Court. I think we have some new members on the jury, so it is necessary for me to go over the ground that I have already gone over with reference to some of the jurors, and that is with reference to your duties as prospective jurors in this case. The duty that you owe to yourselves as jurors in the first place, and next the duty that you owe to the court in the second place, and a very strong duty that
47 you owe to the defendant and the prosecution, the defendants and the prosecution, and that is this: That a juror ought not to reach any opinion, have any impression about a case except as he reaches them by reason of the evidence given in this court room during the trial of this case under the instructions of the court. That will immediately draw to one conclusion, that no evidence should reach you through any other source than through the evidence from the witnesses on the witness stand. It is self evident that you ought not allow anybody to talk to you about it or you to talk to anybody about the case, and it is just as important in my opinion that you ought not to discuss among yourselves anything about this case until it is finally submitted to you, until the evidence is all in and you receive the instructions that I am obliged to give you on the case. If men get to discussing matters among themselves, they are very apt to reach more or less of set opinions before all the evidence was in, which might be an injustice to the defendants or unjust to the Government, and probably might be unjust to yourselves, representing an opinion that wouldn't be based upon all the evidence. You will be careful with reference to your conduct upon the streets and public places during the trial of the case. If you are

in a place where you have a superior right, you should say to the others who might be discussing the case in an innocent way that you are a juror in this case. That ought to be sufficient. If you are in a place where you have not the superior right to be, I *impresume* then it will be sufficient for you to tell them you are jurors. But in either event, if your telling them you are jurors in the case doesn't cause them to refrain from discussion, I wish you jurors under all circumstances of the case would report the facts to me either in chambers or here in court. We will be in recess until 4.30 this afternoon.

(Whereupon court took a recess until 4.30 p. m. of the same day, at which time further proceedings were had, to wit.)

* * * * *
53 The CLERK. You will rise and be sworn. [Swears the jury to try the case.]

(Whereupon Mr. Rustgard makes his opening statement to the jury.)

Mr. COBB. The defendants' counsel has been unable yet to make an opening statement on account of being unable to see his witnesses.

54 Mr. RUSTGARD. I insist that counsel state his theory of the defense, so that will know what his defense is.

The COURT. The court has held on several occasions, and I believe it to be the law, if the attorney for the defense makes any statement have to be made at this time if you wish to make the statement so that the jury will understand you have witnesses on the way or your statement will be abridged for that reason. I have no objection to that if you wish to. I don't mean to say that you have to make a statement.

Mr. COBB. Under these circumstances it is nearly impossible for me to see either one of the three witnesses; have had no chance to see them at all. Neither of the defendants can talk English and it is very unsatisfactory trying to talk to clients or witnesses through an interpreter. I don't feel like would be just to the jury or just to the defense or the court to make a statement and I would like to reserve the privilege, if I can, of making the statement after I have seen these witnesses.

The COURT. Well, I can't say at this time that I could grant you that privilege. It is my opinion that I couldn't.

Mr. COBB. At any rate we will reserve it at this time.

The COURT. Gentlemen of the jury, we will be adjourned at this time until ten o'clock to-morrow morning. The fact that we have one or two new faces in the jury will cause me to go over the matters that I have had to go over now five or six times in the selection of this jury and this will be the last time, because I will only refer to it hereafter when we take an adjournment for any reason, but every word that I am going to say to you is

important. It is important for the reason that jurors when called in such cases and sworn, as this, as in every criminal case, have a very important duty to perform. A juror is entitled to a great deal of respect from those with whom he associates while he is performing the duty of a juror and I have no doubt that he is held in respect by the majority of people, but sometimes you may come in contact with those that don't know you and don't realize probably you are on the jury—on account of may have been somewhat late this evening probably your fellow towns people wouldn't know when you return down town that you are on the jury and they may inadvertently commence to discuss the case that is now before the court. They might even go further than that and commence telling about what they believe to be the facts. It would be an injustice to you as jurors personally as jurors to receive any evidence outside of this courtroom; it would be unjust to the defendants and unjust to the prosecution, because no juror ought to have a single element in the composition of his verdict other than which would be derived in this courtroom under oath from witnesses under the instructions of the court which I will be obliged to give you upon the completion of the evidence. I will then state to you the law that is applicable to the facts that have been developed during the trial of the case and under that law which I state to you and which you will be obliged to follow you must reach your verdict on the evidence that has been brought here. For that reason if

56 during the trial of this case and while you are continuing as jurors in the case, you become embarrassed by reason of their persisting to discuss this case or anything pertaining to it there is one of two things for you always to do. If you are in a place where you have the right to be the superior right to be with reference to the others who are talking about the case you should simply state the fact that you are a juror. Their respect to you as a juror should be sufficient for them to discontinue the conversation. In the event you are in a place where you have the less right to be than those talking about the case and discussing some element of it in that event it would be your duty to leave the place, also telling them you are a juror in the case. In either event if there are any infractions, either in spirit or in fact, in obeying the statement or request on your part that you are a juror it is your duty to report such fact to the court regardless of who the people or person may be in the instance mentioned. Another important fact that I find I should impress on you is that by reason of human nature some are prone to reach conclusions, make up their mind oftentimes upon very small and slight facts. We might shoot a dime in the air and lots of people would bet which side would come up and whether it is heads or tails and so it is in discussing the small features of the case. You gentlemen, right now, without any evidence before you might from what you have heard from the attorneys addressing you might commence and argue and try this case in your own mind without ever receiving a bit of evidence. That would be eminently unfair and unjust

to yourselves with reference to your duties as jurors. It would certainly be unfair to the defendants and the prosecution; it
57 would be unfair to the court as an arm of justice; it would be reaching a verdict without any evidence, and it will be necessary in this case for the case to be proved to you before you would have a right to make any verdict at all other than one of not guilty. Your verdict, however should be expressed, as I said before, by reason of the evidence under oath in this case and therefore it would be unfair to yourselves and your duty and to the defendants and to the prosecution to allow yourselves to commence discussing the evidence before it is all before you; otherwise you might, not by reason of the evidence in the case in and before you, but by reason of the discussions with each other reach a decision different than you would if you left your minds free to receive and weigh the evidence until it was all in and you had my instructions on the law to help guide you in giving proper weight and effect to the evidence already received. For that reason I hope you will bear in mind it is your duty to yourselves, to the court, and to the parties in this case not to discuss between or among yourselves the evidence until it is all in and you have the instructions of the court. Here is another important thing, gentlemen. This is the first case of this importance in which I have—that I recall I have ever allowed a jury to not be kept together in confinement. The attorneys have been generous in this case to your rights, or at least enjoyments, and the court hasn't seen the importance, the absolute importance, of keeping you together, and therefore you are allowed privileges which have never been allowed by me before in this kind of a case. If you were kept together, of course, we would know that none of the local newspapers
58 would reach you; that would be done for your protection and your rights. Now I will have to ask you, gentlemen, upon your honor as men to refrain from that just as much as though we had you up here in custody and you were denied some of the comforts of your home at night and so forth. It will appear to you immediately it would be just as unfair to read a newspaper as it would be to discuss with any one the subject of the trial. It may be embarrassing to you sometimes, but in your own homes or with other people, papers laying about, not to read it, but I don't think it is too much to ask that you do that and, of course, it is absolutely necessary that you do. I can't see any objection if there are local reports, if some of your family or friends remove that and you will read local news, I couldn't object to that, but unless you have to have local news; but it is a matter of very highest importance to you citizens, the highest form of citizenship demands you to receive no evidence except what we will receive here during the trial of the case. I wish you to bear all these things in mind and probably I shall upon adjournment just ask you to remember all these things without restating them again.

(Whereupon the district attorney requested permission to make a further statement, which the court granted.

Whereupon court took a recess until ten o'clock a. m., to-morrow January 4, 1913.)

59

JANUARY 4, 1913.

Court convened at ten o'clock a. m., the parties being present as heretofore, and the jury in the box, further proceedings being had, to wit:

Plaintiff's case in chief.

ALBERT NELSON, being called and duly sworn, testified as a witness on behalf of the Government, as follows:

Direct examination:

Q. (By Mr. RUSTGARD.) State your full name.

A. Albert Nelson.

Q. What is your occupation, Mr. Nelson?

A. Well, I was superintendent of the Dundas Bay cannery last summer.

Q. Were you on or around Dundas Bay in Division Number One of the District of Alaska?

A. Yes, sir.

Q. That is out near Cross Sound?

A. Cross Sound.

Q. In Icy Straits?

A. Yes, sir.

Q. You were there as such superintendent during the month of July last?

A. I was.

Q. Were you acquainted with Frank Dunn?

A. Why, not personally. I seen him, of course. He was employed by this Japanee in the camp.

Q. Well, you knew who he was?

A. I knew who he was, yes.

Q. Now, what was he doing there at the cannery?

60 A. Well, he was working under this Japanese contractor.

Q. Well, under the Japanese contractor. Well, who was the Japanese contractor?

A. Well, the original Japanese contractor, I don't know the name of; at least I don't remember, but this man Itow was foreman, and he was representing that Japanese contractor.

Q. He had charge of the crew working under that contract?

A. Yes.

Q. Now, Itow that is the one sitting to the left of those two?

A. To the right of those two.

Q. Itow, will you stand up. Is that the man?

A. Yes, sir.

Q. That is the one that was Japanese foreman?

A. Yes, sir.

Mr. COBB. I don't care to be captious about it, but the district attorney is leading the witness all the way through. Preliminary matter?

Mr. RUSTGARD. Purely preliminary.

The COURT. I wish the attorneys, of course, during the entire trial of this case be very careful; make a record that you will both be proud of and assist the court.

Q. (By Mr. RUSTGARD.) Do you know in what building Frank Dunn slept?

A. Yes, sir.

Q. What was that building called?

A. China house.

Q. Have you prepared or assisted to prepare any plan of that house?

A. Yes, sir.

Q. Will you look at this plat here on the table and state
61 whether or not that approximately represents the floor plan of that house?

A. Yes, sir; that is a correct plat.

Q. Now, there is a place marked kitchen. Where is that, where the kitchen was?

A. Yes, sir.

Q. Now, this large room on the plat, what does that represent?

A. That is the mess room.

Q. Mess room?

A. Dining room.

Q. Now, these—there are rooms in here, what were they?

A. Well, they were occupied by Chinamen; Chinamen and Mexicans.

Q. Chinamen and Mexicans. In what room did Frank Dunn sleep?

A. In this corner room.

Q. The one that is marked here "Dunn's room?"

A. Yes, sir.

Q. What does that portion refer to?

A. That is the approach from the beach going to the China house.

Q. Now, what does that picture represent?

A. That represents the back part of the China house.

Q. By the back part, you mean the portion that faces the beach.

A. Yes, sir; no, not—faces the upland.

Q. Faces the upland. Now, how long is this bridge or approach in front of the door, represented on that picture?

A. Well, it should be in the neighborhood of about 15 feet.

Q. What is it?

A. 12 or 15 feet.

Q. 12 or 15 feet. What is the grade of that approach?

A. Oh, about a quarter.

62 Q. One in four?

A. Yes.

Q. Can you state approximately what is the elevation of the doorway, that is to the threshold, above the ground immediately below it?

A. Well——

Q. Can you say?

A. About five feet—four or five feet.

Q. What, approximately, is the distance from the doorway to the corner of the building to the right of this picture?

A. Why, approximately, 40 feet.

Q. I notice there is a water tank represented on this photograph close to the rear end of this building you call the China house. State how close to the corner that water tank stands?

A. Well, the water tank would be about two or three feet from the corner.

Q. Now——

A. Three or four feet.

Q. Now, how does the rear part of the water tank there stand on which it is elevated to correspond with the end wall of the building? Is it flush or otherwise?

A. No; it isn't flush; a little bit inside; inside the rear.

Q. The water tank is a little in from the corner?

A. Why——

Q. Can you state approximately how much?

A. Why, it can't be more than three or four feet. I should judge in that neighborhood.

Q. Is that photograph a correct——

63 Mr. COBB. If the court please, this case should be put under the rule. I don't care anything about this description of the ground. I suppose getting down to the testimony——

The COURT. All witnesses in this case, both for the defendants and the prosecution, will not come in the room or remain in the room except as called as witnesses until they get permission of the district attorney or the court.

Q. (By Mr. RUSTGARD.) I ask you, Mr. Nelson, is that photograph a correct representation of the rear elevation of that China house?

A. Yes, sir.

Q. That is one of the buildings of the cannery over which you were superintendent?

A. Yes, sir.

Mr. RUSTGARD. I offer that photograph in evidence for the purpose of using during the trial, your honor.

The COURT. It may be admitted for the purpose of illustration of the testimony to be given in the case.

Mr. COBB. I think I want it in evidence myself, but I think before it is admitted it should be shown who took it and what time.

The COURT. That may be shown, if it hasn't already been shown. I probably missed that.

Q. (By Mr. RUSTGARD.) First, whether it is a correct picture or not. Do you know who took the picture, Mr. Nelson?

A. Yes, sir.

Q. Who did it?

A. A gentleman by the name of Billie Doyle; he is living at Hoonah.

Q. Is he here?

64 A. No; he is living at Hoonah.

Q. That—certainly—I show you this card; is that the original copy of the picture?

A. Yes, sir.

Q. And the one on the table which you have referred to is an enlargement of it?

A. I believe so; yes.

Q. (By the COURT.) Where is the enlargement?

A. (By Mr. RUSTGARD.) Taken by Mr. Case, right here in this city, at my request.

The COURT. It is always important in offering photographs in order to be entered in evidence for the jury to know as much as they can about the position in which the photographer stood and which surrounded him when the picture was taken.

Mr. RUSTGARD. Under the circumstances, I offer the original picture, the small one, together with the enlargement.

The COURT. They may be admitted as one exhibit and marked "Prosecution's Exhibit No. 1-A and No. 1-B." [Hereto attached at page —.]

Q. (By Mr. RUSTGARD.) State, Mr. Nelson, whether or not that floor plan in blue pencil on the drab paper is a correct representation of the floor plan of the China house represented in the picture?

A. Yes, sir.

Mr. RUSTGARD. I offer that in evidence for the purpose of using it during the progress of this trial for illustration.

The COURT. May be admitted and marked as Plaintiff's exhibit No. 2 for the purpose of illustrating the testimony received in this case by the jury. [Hereto attached at page —.]

Q. (By Mr. RUSTGARD.) Did you on the evening of the 14th of July, last, see the defendant Itow?

A. Yes, sir.

Q. What time in the evening did you see him?

A. Oh, around midnight or perhaps a little bit before.

Q. Well, state to the court and jury what you saw of him at that time?

A. Why, the first I saw of him he was standing on the approach to the China house door with a sword in his hand and brandishing it over his head, and he was talking to some of the boys in the doorway here [indicating]. I don't know who they were in the doorway,

because it was too dark. I couldn't see; in fact, I was about fifteen or twenty or twenty-five feet, perhaps, away from the approach. Was about here [indicating], and he was standing here [indicating], and I hollered to him. Will I have to state that?

Q. Well, did you see anything?

A. Well, I saw him standing with a sword, brandishing it over his head, like that [indicating], challenging somebody in the doorway.

Q. Well, state what—state what you said and what he said at that time.

A. What I say?

Q. Well, what, then, you saw of this witness?

A. Well, I called his name; I told him to come over where I was standing, and he didn't pay much attention to it the first time. The second time I called I noticed he looked over my way and
66 then he fired a shot with the pistol in through the doorway there, and just about that time some of the crowd inside of the doorway commenced to throw cordwood, sticks, and kettles, and one thing and another out through the door, and he walked around to where I was standing, and he dropped his sword and pistol within six or eight feet of me on the sidewalk.

Q. Did you pick them up?

A. I did, sir.

Q. What did you do with them?

A. I took them over to my quarters.

Q. Well, at the time you came up there and before you spoke to Itow, did you hear Itow say anything?

A. Before; no, I did not.

Q. Well, you said—you made a statement that he was challenging somebody?

A. Well, yes; he said, "Well, you come out all of you fellows," and he said that "I will fix all of you, you come out, any one of you."

Q. Well, look at this sword, Mr. Nelson, and state to the court and jury whether you had seen it before?

A. Yes, sir; I have.

Q. Now, is that sword in the same condition as it was when you picked it up?

A. Yes, sir; I don't see no difference.

Q. By the way, where did you pick that sword up first?

A. I picked it up on the sidewalk, about here [indicating].

Q. Well, is that the sword which he threw down, you spoke about?

A. Beg pardon?

Q. You testified he threw a sword and pistol down in front of you?

67 A. That is the one.

Q. That is the one. Now, look at the blood stains on it. How do they compare with the condition in which the sword was at that time?

A. Well, they are just about the same; about twenty inches, extending on one side at least.

Q. Well, can you state to the jury whether or not the blood on the sword at that time was dry or not?

A. No; it was not dry at that time. It was wet.

Mr. RUSTGARD. I offer the sword in evidence, your honor.

Mr. COBB. Let's see it.

The COURT. May be admitted and marked as "Prosecutions Exhibit No. 3." [Hereto attached.]

Q. (By Mr. RUSTGARD.) I show you a revolver, Mr. Nelson, calling your attention to the fact that it is loaded—handle it with care—and ask you whether or not you have seen that before?

A. Yes, sir.

Q. Where did you first see it?

A. Saw it at the same time that I picked up the sword, I picked up this gun.

Q. Well, is that the revolver that you testified Itow threw down in front of you?

A. Yes, sir.

Q. What did you do with it when you picked it up and afterwards?

A. I brought it over to my quarters the same as the sword.

Q. And what did you do with it after you had it there?

A. I gave it to the marshal when he came.

Mr. RUSTGARD. I would suggest, your honor, that the revolver be unloaded.

The COURT. Yes; ought to be unloaded.

Mr. RUSTGARD. Offer it in evidence the way it is, however.

The COURT. Just unload it in the presence of the jury so they can see what was taken from it.

Mr. RUSTGARD. I call your attention to the fact that there is only one chamber of it empty. The others are loaded cartridges.

The COURT. Just before you do that, better break it.

Mr. RUSTGARD. I guess it does. I will let the jurors examine it, however.

The COURT. I was going to suggest that it be broken before handing it to the jury. I don't like the idea of handling it that way when it is loaded.

Q. (By Mr. RUSTGARD.) At that time did you see Frank Dunn anywhere, Mr. Nelson?

A. No; not just then. I saw him afterwards; yes.

Q. Well, how long afterwards did you see Frank Dunn?

A. Well, it must have been fifteen minutes; about that.

Q. Where did you see him?

A. I saw him lying on the—what was left of him on the rocks here.

The COURT. I would suggest that when the witness points to that plat that some designation be made so that your record will be complete.

Mr. RUSTGARD. I will bring that out, Your Honor.

Q. How far from the lower end of that incline leading up to the door of the China house was he lying?

A. Well, approximately fifteen feet.

Q. In what direction from and on what side of that incline?

69 A. Well, on the left side, about in here [indicating].

Q. Towards the left as represented by the picture?

A. Yes, sir.

Q. In what condition or position was he lying?

A. He was lying on his back with his—with his feet kind of doubled up, this way [indicating].

Q. Was he dead or alive?

A. He was dead.

Q. What was done with his body?

A. Why, we packed it over to the place I call the carpenter shop.

Q. Do you remember who packed him over there?

A. Well, I think I remember some of them. I don't remember all of them. There was quite a bunch of them.

Q. What was finally done with Frank's body?

A. Why, it was lying there about three days, I think, until the marshal came and took it.

Q. Where was it sent then?

A. To Juneau, I understand.

Q. What was done with Itow?

A. Well, Itow was—nothing done with him until the marshal come. He took him to Juneau.

Q. At whose request did the marshal come?

A. I did.

Q. You sent for him?

A. Yes.

Q. Well, do you mean, then, that Itow and the body of Dunn were sent down to Juneau on the same boat.

A. Yes, sir.

Q. About three days afterwards. Do you remember what boat it was?

70 A. The "Georgia," I think.

Q. The "Georgia." Did you examine the wounds of Frank Dunn?

A. Yes; yes; I examined it. The wound in the shoulder.

Q. Well, what did you find?

A. I found a deep gash in there. I didn't know how far it was—how far in it went—because we didn't examine the lower part of the body, and, of course, the blood was running out of it in a big stream.

Q. State whether or not there was any evidence of blood about his body.

A. No, not that we see; no other.

Q. Well, I mean in the clothing or when you picked him up, did there—was there any evidence of any blood about him?

A. Oh, yes; lots of blood over on this side.

Q. Do you remember whether there was any blood on the ground?

A. Yes; lots of blood on the ground.

Q. You didn't make any further examination of the wounds on the body?

A. No, sir.

Q. How old a man was Frank Dunn?

A. Well, I don't know for sure, but I was told he was about twenty-three years old.

Mr. COBB. We object to hearsay.

Mr. RUSTGARD. Never mind what you were told, but from appearances?

A. Well, I should judge he was about that age.

Q. Do you know where he came from?

A. Not positively. I know he was American born.

Q. (By Mr. COBB.) Well, wait a minute. You know that of your own knowledge?

71 A. Well, only what he told me himself.

Mr. COBB. Object to it as hearsay.

The COURT. Objection overruled. I think on that question of what he said, I think he would have to say any place where he was born and his parentage.

Q. (By Mr. RUSTGARD.) Do you know the place of his birth, by the same kind of information?

A. Toledo, Ohio.

Q. Toledo, Ohio. Do you know whether he had ever been to Alaska before or not?

A. No; I don't know that.

Mr. RUSTGARD. I think that is all.

Cross-examination:

Q. (By Mr. COBB.) Before you take a seat on the stand, I want to ask you a few questions about this. Who drew this plan marked "Plaintiff's Exhibit 2"?

A. Well, I drew one similar to that there; not exactly that one.

Q. Did you take any measurements so as to draw it to scale?

A. No; I didn't. The house is supposed to be 25 by 80.

Q. Supposed to be 25 by 80. That drawing, then, as I understand it, Mr. Nelson, was not made by you, this particular one?

A. Well, not exactly that one, but the one, the tracing was made by me.

Q. You made a tracing from which this appears to be a copy?

A. Yes.

72 Q. And you didn't draw that—you didn't draw your tracing to scale, your measurements?

A. No, no; a rough sketch.

Q. Just a rough sketch. Did you take any measurements of the height of the approach to the door there above the ground?

A. Well, I know that was approximately four and a half feet. It is—I was there when we built it; a new house built, this here.

Q. But you didn't take any measurements at all at this time?

A. Well, no; not exactly to the inch; no.

Q. Now, is this building that you have identified, the sketch of it here, as the China house, the only buildings around there?

A. No, there is other buildings.

Q. Well, now, which way do they lie from the China house, speaking now with reference to this plan?

A. Well, there is one building about here [indicating] called the Japanese building.

Q. Out in front of it?

A. Yes, sir.

Q. And about how far away from it?

A. Well, I should think from this corner right across would be about 30 feet, 25 feet.

Q. Well, that is the Japanese house?

A. Yes, sir.

Q. You mean by that, that is where the Japs had their quarters?

A. Yes, sir.

Q. Where Itow and Fushimi and the other Japs there stayed?

A. Yes, sir.

Q. And the Mexicans and Dunn stayed in the China house and some Chinese in there also?

73 A. Yes, sir.

Q. Which way was the salt water from this house, which direction?

A. This direction.

Q. This direction [indicating]?

A. In fact, the salt water run underneath the house; comes up so far as here.

Q. The salt water at flood tide was from the top of the drawing downwards in that direction, extending out under the approach?

A. Yes, sir.

Q. That was bare at low tide?

A. Bare at low tide?

Q. And at high tide it was flooded?

A. At neap tide.

Q. Well, now the Japanese house, tell the jury whether that was on the upland or tide flats?

A. Well, the Japanese house was practically all on the upland, because only the extreme high tides would get up to the corner.

Q. But that was up on pilings a little bit, was it?

A. Yes; a little bit.

Q. Now, Mr. Nelson, from the foot of the approach over where the approach that you have drawn on this plan terminates towards the lower end of the plan, along there somewhere, there was a sidewalk that you have mentioned?

A. Yes, sir.

Q. Where did that go to?

- A. Well, went over towards this corner of the house, around this way [indicating], towards the cannery.
- 74 Q. Around towards the cannery. Where did you live?
- A. I lived about 300 feet, I should judge, from this house. I got a cottage over there, in this direction.
- Q. Out towards the right, then, as you stand facing this plat?
- A. Yes, sir.
- Q. Is it?
- A. Yes, sir; towards the right.
- Q. About 300 feet. The sidewalk to which you refer is the one shown here slightly in the picture?
- A. Yes, sir.
- Q. And these two boards shown in the lower part of the picture there are two heavy boards?
- A. That leads across to it.
- Q. Where does that lead to?
- A. To a pigpen where the Chinese had some pigs.
- Q. This pigpen is also on the tide flat?
- A. No; the tide don't get up that far.
- Q. Don't get up that far. Now, I think you may sit down.
(Revolver received and marked as "Prosecution's Exhibit No. 4.")
- Hereto attached.)
- Q. (By Mr. Conn.) At the time that you delivered that sword to the marshal did you deliver it to him in the scabbard?
- A. No; just with a paper around it.
- Q. How is that?
- A. No; just with a paper around it.
- Q. Just with a paper around it. That was in substantially the condition, then, that you found it?
- A. No; there was no paper around it.
- Q. I say when you wrapped it up, it was in substantially the same condition?
- 75 A. Yes.
- Q. What were you doing up that time of night, Mr. Nelson?
- A. Well, I was aroused from my sleep by somebody coming to my door, rapping on the front part of the house.
- Q. Do you know who that was?
- A. Yes, sir.
- Q. Who was it?
- A. It was that Ed. Fushimi.
- Q. And then what happened?
- A. Well, I asked what he wanted, and he said they had trouble over to the China house. I said, what kind of trouble, and he said lots of fight; Frank killed, he said. At that time I didn't know who was Frank, that is Frank, and I didn't think of it being this white man, and I went back up to my room and dressed, and when I come back there was quite a few of the Japanese and Mexicans out there kind of scrapping out in the sand and having a general row. I got them

quieted down, and I went over to find out what the trouble was—the trouble.

Q. Now, Mr. Nelson, when you say you come out you see quite a few of the Mexicans and Japanese scrapping around. Where was this scrap going on?

A. On the beach there, between the China house and my house. It was dark. I couldn't exactly see for sure who they were. It was dark.

Q. But you do know there was a scrap going on there between the Japs and the Mexicans?

A. Well, yes; what is—there was—there is afterwards, a scrap after that.

Q. Well, now, did you do anything to stop the scrap?

76 A. Yes; I told them if they wanted to scrap to get away from where my house was, because I had my family there, and I didn't want that around the house like that.

Q. Well, did anybody else call you and notify you of a scrap going on beside Fushimi?

A. Well, I think there was somebody else. He come up on my porch there just about the time I came from my room.

Q. That was after you dressed?

A. Yes; after I dressed.

Q. Do you know who that was?

A. No; I don't remember who they were.

Q. Well, when you notified them if they wanted to scrap to get away so they wouldn't disturb your family, then what did they do?

A. Well, they kind of stopped scrapping there, for the time being, at least. I went after them, and I went over towards the China house to see what was the trouble.

Q. Well, when you got, you say, within about 15 feet of it you saw Itow?

A. 15 or 20 feet off from the approach to the China house.

Q. From the approach to the China house?

A. Yes.

Q. Could you see him before you got close?

A. Well, no; I could see the man there.

Q. But you couldn't recognize him until you got that close?

A. No.

Q. Could you positively recognize him then?

A. Well, I could, yes; in fact, I knowed it was him because the China boss come up behind me.

Q. That was Oooyoung?

A. Wong.

77 Q. Wong. He come up behind you?

A. Yes.

Q. Did he tell you who it was?

A. Well, he hollered "Itow."

Q. And then you knew it was him?

A. Well, I knew it then; when he turned around I saw it was Itow.

Q. Well, now you say the first time you spoke to him he didn't seem to pay much attention. Do you know whether he heard you or not?

A. Why, I should think he did. I hollered for all I was worth.

Q. And the second time you hollered he came towards you and threw the sword and pistol down in front of you?

A. Yes.

Q. Anything said then? Did you say anything?

A. No; I didn't say anything. I picked up the sword and took it over to the house.

Q. Where did Itow go then?

A. Well, Itow and some of the other crowd they come over toward my house again, and some of the Mexicans also, and they had a little scrap there again.

Q. Who had the scrap?

A. The Mexicans and Japanese.

Q. Which Japanese?

A. Well, there was—I don't know their names.

Q. Now, you mean to tell the jury—you said awhile ago in response to the district attorney's questions that these Mexicans were in the door of the China house when Itow—when you first saw Itow?

78 A. Well, there was some of them; yes. I don't know who they were. I didn't see who was in the door.

Q. Well, now, when Itow came towards you, and threw down his sword and pistol, did these Mexicans follow him out?

A. I believe they did. I didn't pay any attention to it; I think they did.

Q. They did?

A. Yes.

Q. And you say you know they were throwing cord wood?

A. Yes.

Q. Skillets, missels, at him?

A. Yes.

Q. Whereabouts were you when they followed him up and renewed the fight?

A. Well, I didn't see him—the fight within—but they had a fight outside my door. I didn't see Itow. I don't think he was in the fight at that time.

Q. You don't think he was in it?

A. No.

Q. Do you know where he had gone to?

A. Well, he was sitting on my porch at that time.

Q. Sitting on your porch?

A. Yes.

Q. And did you turn back towards your house immediately when you picked up this sword and pistol?

A. Yes, sir.

Q. And where did Itow then go? Go along with you?

A. He followed behind, no doubt. I went into the house.

Q. You went into the house and when you came out the next
79 time you saw him sitting on your porch?

A. Yes.

Q. Did you see Fushimi at that time?

A. Well, I guess he was in that crowd. I wouldn't say for sure that I saw him for sure.

Q. Do you know who these Mexicans were that were engaged in this fight?

A. Well, yes; I know.

Q. Who were they?

A. Well, there was what you call the Mexican foreman, the big fellow.

Q. What is his name?

A. I don't remember his name, and this man that was shot.

Q. What is his name?

A. I don't remember his name, in fact.

Q. (By Mr. RUSTGARD.) Costillo?

A. Costillo; yes.

Q. (By Mr. COBB.) And who else?

A. Well, I don't know the names of them. There was quite a bunch of them around there.

Q. Mr. Nelson, how many men did you have over there in that China house of the Mexican crowd?

A. How many Mexicans?

Q. Yes.

A. Well, I don't know really how many Mexicans there was because I never asked their nationality.

Q. Well, can you give the jury some idea of the crowd you had there?

A. Well, I should think the Mexicans and Porto Ricans
80 must have been seven or eight anyway, at the very least.

Q. Seven or eight. Now, was there anybody in there besides this seven or eight Mexicans and Porto Ricans and Dunn?

A. In the China house?

Q. Yes.

A. Yes; and the China boss was there and some of his.

Q. Oo Wong?

A. Yes, sir.

Q. Well, how many other Chinamen?

A. Well, I don't really know how many Chinamen he had. He had, I should think, about 15 or 20 perhaps.

Q. How many men slept in each of those rooms?

A. Well, I couldn't say that—how many men exactly there was in each room.

Q. Who was in the room that was marked "Dunn's room" there besides him?

A. There was some Mexicans in there.

Q. How many Mexicans in the room with Dunn?

A. Perhaps three or four; I couldn't say for sure; Mexicans and Porto Ricans.

Q. Now how long before you went back—no; before I ask you that—I withdraw that question—after you went into your house with this pistol and sword did you leave it in there?

A. Yes, sir.

Q. Did you come out immediately?

A. I did.

Q. And I believed you stated when you came out there was another scrap going on?

A. Yes.

Q. Did you stop that scrap?

81 A. Well, I attempted to; yes.

Q. You attempted to?

A. Yes.

Q. Did you succeed in getting it stopped?

A. Yes.

Q. What did you do to stop it. Just tell the jury. I want you to tell them just what happened. Give them a clear idea of the transaction.

A. Well, between the time this scrap occurred on top of the porch in front of my house there was quite a few of the fishermen and some of the crowd employed in the cannery of white men came over and they assisted me in stopping this scrap and pulled them away from the house; told them to get away.

Q. Can you give the names of any of the Mexicans that followed these—you and this Itow up and engaged in this scrap there on two different occasions in front of your door?

A. Well, I can give this Costillo and this big Mexican foreman.

Q. Manuel?

A. Well, I wouldn't say Manuel was there at that time; I wouldn't say which time.

Q. Well, it was pretty dark?

A. Well, it was dark in a way and then there was so many around you know.

Q. Yes. Well, how long before you went back towards the China house?

A. Well, what time? After the body or—

Q. Yes.

A. Oh, it must have been about 15 minutes.

Q. You went over as soon as you got the scrap stopped?

82 A. Yes.

Q. Anybody go with you?

A. Yes; there was a few boys went over.

Q. Who went with you?

A. Well, there was quite a crowd followed me, too. There was one man by the name of Hogan. I know he was there.

Q. Anybody else?

A. Yes. I believe——

Q. That you can recall?

A. Well, there was one named Wick, I think, and there was a few more. I don't remember their names; quite a few of them; I believe the carpenter, Adams, and Mr. Conay was also in the gang.

Q. Now, where did Adams, the carpenter, and Wick sleep?

A. Well, Wick, he was not employed by the cannery. He was fishing for us—that is, by private gear. He had a boat and was fishing with a man; they had a boat of his own, but this was Sunday night and they were on shore.

Q. Well, do you know where he was sleeping that night?

A. No; I don't know if he slept at all that night.

Q. Where did the carpenter sleep?

A. The carpenter slept upstairs over the—over the dining room in the mess house.

Q. In the mess house. How did you get upstairs?

A. There is a stairway.

Q. Outside or inside?

A. Inside.

Q. Then this house that you speak of, that you have drawn the ground plan or lower floor of there, was a two-story house?

A. No; that is not the same house. The carpenter slept in
83 the mess house—the white men's house.

Q. Oh, yes; well, where is that house?

A. Well, that is between the China house and the cannery.

Q. How far?

A. Well, must be about 600 feet—500 or 600 feet.

Q. 500 or 600 feet?

A. From the China house.

Q. And that was where Adams slept?

A. Yes.

Q. And all the white men?

A. Yes.

Q. Well, now, when you got back—did you know before you got
back to the body that this man that they call Frank was dead?

A. Yes; they told me he was dead.

Q. Who told you he was dead?

A. Well, some of them in the crowd told me he was dead.

Q. Do you remember who that was?

A. No; I don't.

Q. Well, now, you stated that there was quite a good deal of blood?

A. Yes, sir.

Q. Where was the wound—on the left shoulder?

A. I think it was.

Q. On the left shoulder. The blood soaked out through his coat?

A. Yes; quite a bit of blood on his shoulder. He didn't have a coat on. Had a shirt on.

Q. The deceased had on all of his clothes?

84 A. Beg pardon.

Q. I say the body had on all of its clothes?

A. Didn't have any coat on that I saw.

Q. Didn't have a coat on. Had on a vest and shirt?

A. I don't know; he didn't have a coat on; I couldn't say; he had a shirt, and maybe had a jumper; I couldn't say.

Q. Maybe had a jumper?

A. Yes; I couldn't say.

Q. Now, how long had you known the fellow Frank?

A. Well, practically, I know him since he came up.

Q. When did he come up?

A. Oh, must have come up about the first of May.

Q. Do you know how he came to come up there?

A. Well, I know he come up with some other substitutes from down below.

Q. Where did he come from? Where was he employed?

A. Come from Seattle.

Q. Do you know whether he came from beyond Seattle, or do you mean he just sailed from there?

A. He sailed from there is as far as I know.

Q. Do you know where he came from before that?

A. No, sir.

Q. And, of course, all you know about his sailing from Seattle just the fact sailed from there. Where do you get your men?

A. The Chinese contractor, or the ones who have the contract for the canning of salmon, of fish. He gets his men—I don't know where he gets them; gets them from all over the States.

Q. Where does he stay?

A. Seattle.

85 Q. Seattle. He gets his men from anywhere along the coast he can and sends them up under contract. Did this man Frank Dunn come up under that sort of contract?

A. So I understand; yes.

Q. Now, how long had you known Itow?

A. Well, Itow come up with me in the ship.

Q. What time?

A. We left Seattle the second of April.

Q. Had you ever known him before that?

A. No, sir.

Q. This is the first year he has been at that cannery?

A. Well, that was the first year I was at that cannery.

Q. That was the first year you were there?

A. Yes, sir.

Q. Well, this is the first year you were acquainted with Itow?

A. Yes.

Q. He had been there since what time?

A. Well, we arrived there, I think, about the eighth of April.

Q. Eighth of April. Was Itow in any sort of trouble before that?

A. No, sir.

Q. Well, now tell the jury whether there had been anything prior to that time to lead you to expect a row of any sort?

A. No; I didn't expect no row; no; what I knowed.

Q. How is that?

A. No; not that I know of that there was going to be any row.

Q. That is all. Just one other. Excuse me. How did you know this man's name that was killed?

A. Frank.

Q. Yes.

86 A. Well, I know him in the cannery. He happened to work in the cannery right there where I a good many times pass by.

Q. And you just heard him called that?

A. I heard them call Frank; yes.

Q. Whether that was his real name or not, you don't know?

A. I couldn't say.

Q. Now, at the time he came up, who did he come up with?

A. He come up with some Mexicans, I believe, and Porto Ricans in the steamer "Northwestern."

Q. He came up with the Mexicans and Porto Ricans that had been sent up as substitutes, you say?

A. Yes.

Mr. COBB. That is all.

Redirect examination by Mr. RUSTGARD:

Q. How long after you were aroused that night did it take you to get out of bed and out in front of your porch?

A. Well, I could—I was immediately; that is I went out in my night clothes first and then I went back and dressed.

Q. Well, were you at the time you saw Itow?

A. No, sir.

Q. Well, now then how long did it take you before you after you had been aroused and before you left your house?

A. Until I saw Itow?

Q. And went up to where Itow was?

A. Oh, I should think about five or eight minutes.

Q. At the time you came out who did you see on the porch
87 or near there?

A. Well, I don't remember who they were, but there was quite a bunch of them; that is scattered around there at that time. It was dark, and I didn't pay much attention who was there.

By the COURT. Are you speaking now of the first time you came out or after you dressed?

A. After I dressed.

By Mr. RUSTGARD. Who did you see the first time you came out?

A. Ed.

Q. Anybody else?

A. No; not that time. He was the only one on the porch.

Q. Well, when you had got your clothes on who did you see?

A. Well, there was quite a few around there in front of the porch. I seen the Chinaman boss, Wong.

Q. Who else?

A. Well, I couldn't say the others; there was so many of them at that time.

Q. Did you see any white people there?

A. Well, no; not just at that moment; no.

Q. Not at that moment. Did you see any Mexicans at that time?

A. Well, I couldn't say who they were. It was really too dark. I couldn't say who they were.

Q. Can you give the jury any idea of how many you saw out there at that time?

A. Well, there must have been about perhaps a dozen, more or less, I couldn't say for sure.

Q. How far is it from your house up to the doorway to the China house shown on the picture?

88 A. Oh, 350 feet or so.

Q. Now, coming back, who did you see on your porch? You said there was a fight on your porch when you came back, or near there.

A. Yes.

Q. Well, who did you see there?

A. Well, there was this—I don't know his name. He come in here with Itow the first time. The Japanese——

Q. Bookkeeper?

A. No; the other fellow; he was kind of interpreter, coming in the first time with Itow; he was there and Itow was there also at that time, and some of the other Japs and Mexicans.

Q. You saw some Mexicans there at that time?

A. Yes.

Q. Well, now, when you came out of the house the first time, or that time prior to the time you had seen Itow up near the China house, had you seen any Mexicans near your house?

A. Why, I wouldn't say for sure; I couldn't say; it was really too dark.

Q. How many Chinese were engaged at the cannery?

A. Why, there must have been in the neighborhood of about twenty Chinese, fifteen or twenty.

Q. How many Japanese?

A. Well, there was supposed to be 36 all told, that was the contract, 36 Japanese and Chinese and Porto Ricans.

Q. Working under that contract?

A. Yes.

Q. How many white men did you have at the cannery?

A. Well, had about——

89 Q. That is outside of that contract?

A. Oh, we had about eighteen or twenty all told.

Q. Now, the white men had a mess house by themselves?

A. Yes, sir.

Q. That is, by the white men I refer to those not under the Chinest contract.

A. Yes.

Q. Some questions I will ask you in regard to this plan. Now, you said you had drawn one yourself. What was the difference between the one you drew and that one there?

A. The only difference is that is a blue pencil and mine was black.

Q. Is there any difference in the size?

A. No, sir.

Q. I mean in the size of the plan scale?

A. Well, that is scaled a little bigger; yes.

Q. Were you present when that was prepared from your plan?

A. Yes, sir.

Mr. RUSTGARD. That is all.

Recross-examination:

Q. (By Mr. COBB.) You say there were 36 men that the contract called for?

A. Yes.

Q. And Itow was the foreman of that bunch of thirty-six?

A. No; Wong was the foreman, Chinese foreman.

Q. Wong?

A. Yes; had charge of all the Orientals.

90 Q. Well, you spoke of Itow's being foreman?

A. Well, he was foreman of the Japanese.

Q. He was foreman of the Japanese?

A. Yes.

Q. (By the COURT.) I don't think I understood your answer as to how many Japanese there was under contract.

A. Well, there must have been about twenty anyway.

Q. Twenty Japanese?

A. I should think close to it, at least, or there should be upon the beginning; but I don't know whether there was that many or not.

Q. (By Mr. COBB.) Another question. These twenty Japs, then, and the Porto Ricans, Mexicans, and Chinese were all under the same contract, were they?

A. Well, yes, so far as I know.

Q. Well, I want to get that clearly, Mr. Nelson. Your men that you had in the mess house that you have mentioned as the white men?

A. Yes.

Q. They were employed by you direct?

A. Yes, sir.

Q. Now, this bunch of 36 were sent up to you by the Chinese contractor below or the Japanese contractor?

A. Yes, sir.

Q. And that included the Japanese, the twenty Japanese, the seven or eight Mexicans and Porto Ricans, and the Chinese?

A. Yes; that included all that bunch there.

Q. And they all stayed in this China house?

A. No; not the Japanese.

91 Q. Except the Japanese?

A. Yes.

Q. The Japanese had a house by themselves over across the way in front of it. That is all.

Re-redirect examination:

Q. (By Mr. RUSTGARD.) Well, who was Frank's foreman. Who had charge of him?

A. Mr. Itow.

Q. Itow. That is all.

The COURT. Call a witness.

Mr. RUSTGARD. Mr. Wick.

92 JOHN WICK, being called and duly sworn, testified as follows on behalf of the Government, to wit:

Direct examination:

Q. (By Mr. RUSTGARD.) Will you state your full name?

A. John Wick.

Q. John Wick?

A. W-i-c-k.

Q. How old are you?

A. Twenty-two.

Q. Twenty-two. Have you ever been at the Dundas Bay cannery?

A. Yes.

Q. Were you there last summer?

A. Yes, sir.

Q. What time were you there last summer?

A. In July.

Q. In July. What was your business there?

A. Fishing.

Q. Fishing. Do you know this defendant Itow?

A. Yes, sir.

Q. Do you know Ed. Fushimi, sitting alongside of him?

A. Yes.

Q. Did you see them anywhere last summer?

A. Yes.

Q. Where?

A. Dundas Bay.

Q. Did you know Frank Dunn?

A. Yes, sir.

93 Q. Do you remember whether you saw Frank Dunn on the evening of July 14th, last, or not?

A. Yes.

Q. Now, where did you see Frank?

A. I met him down by the cannery.

Q. And where did you see him after that?

A. I seen him and went with him to the bunkhouse.

Q. (By the COURT.) Who went with him to the bunkhouse?

A. Yes; me and John Hogan.

Q. (By Mr. RUSTGARD.) You and John Hogan went with him to the bunkhouse?

A. Yes.

Q. Now, what bunkhouse is that?

A. That is the China bunkhouse.

Q. I call your attention to this picture, marked "Plaintiff's Exhibit 1-B." Can you see from where you are sitting?

A. No. Right at the door.

Q. Well, that is the picture you refer to as the bunkhouse. Now, where did you leave Frank Dunn that evening?

A. Left him right at the door; right there inside the door.

Q. You say you went with him to the doorway, right inside the door, and talked with him for a little while?

A. Yes.

Q. Now, was Hogan with you at that time?

A. Yes, sir.

Q. What is Hogan's first name?

A. John Hogan.

Q. John Hogan. Now, where did you and John Hogan go after that?

A. We went over towards the Indian town, over this way.

Q. That is the houses shown—

94 A. Yes.

Q. On the left of the picture?

A. Yes.

Q. Well, what, if anything, happened there?

A. Well, we met Itow and Fushimi.

Q. You two met Itow and Fushimi?

A. Yes.

Q. Speak loud, so we can all hear you. How far was that from the door of the China house that you met those two men?

A. Oh, about sixty feet.

Q. How long was that after you parted with Dunn? How long was that after you left Dunn?

A. About ten minutes.

Q. About ten minutes. Now, what happened at the time you met Itow and Fushimi in that place at that time?

A. Well, Itow took up his revolver out of his pocket and done just like that to me [indicating].

Q. At you?

A. And—

Q. Well, now, suppose I am Itow?

A. Yes.

Q. Suppose I am you, and you are Itow; how did they do?

A. Just went like that [indicating]; pulled his revolver up and down just like that [indicating].

Q. Well, what did he do after that?

A. Then he put it back in his pocket again, and John Hogan was standing on his right side, and he turned around to him and said "You are all right" and he gave him a cigar.

Q. How far away was he from you at the time he pointed that revolver?

A. About four feet.

95 Q. How far away from you did he hold the revolver? Just show the jury as if I were in your place and you were Itow.

A. Well, just like that [indicating].

Q. Approximately three feet, two feet and a half?

A. Yes.

Q. What time of the night was that?

A. Before eleven.

Q. At night?

A. Yes.

Q. Do you remember the date?

A. The 14th of July.

Q. Last summer?

A. Yes.

Q. Now, then, after that what happened?

A. Well, then Fushimi said, "Let's go home," said to Itow; and after that we didn't see—not going for the time they come down the gangplank.

Q. Well, tell us about that?

A. Well, then we moved over a little further towards the corner, and then afterwards went home.

The COURT. You must speak so those twelve can hear you.

Q. (By Mr. RUSTGARD.) You mean after Ed. Fushimi and Itow moved away, you moved where?

A. After that went home.

Q. You went home. You went where?

A. We went over to this house here, supposed to be right in line with the China house. You can't see it on the picture.

Q. You can't see that on the picture? That is to the left of the picture?

96 A. Yes, sir.

Q. Well, what happened there?

A. We was standing there talking. Carl Waldall and Henry Waterly they came over and met us, me and John Hogan, and we was talking there for about five minutes and that is the time we heard some—we heard somebody come down the gangplank there and we moved over and we seen that it was four together.

Q. Now, where were they coming?

A. Coming down this way, the gangplank.

Q. This is the gangplank?

A. Yes, sir.

Q. From the doorway shown on this picture Exhibit 1?

A. Yes.

Q. Now, then could you see who those four men were?

A. Not at that time I was over there, but we run over.

Q. Well, what became of those four men coming down the gang-plank?

A. Well, they come down to the end and went over this way.

Q. To the left of the foot of the gangplank?

A. Yes.

Q. What happened there?

A. Well, then we seen the sword.

Q. You saw the sword?

A. Yes.

Q. Look at that sword on the desk up there and see if that looks like it.

A. Well, I couldn't tell——

Q. Look up there.

A. Because I seen it in the dark; I just seen it shining there.

97 Q. Seen the shine on it?

A. Yes.

Q. Well, what happened at that time? Just tell the jury the whole thing now. Turn around to the jury and tell them.

A. Well, then we seen the sword in the air and he just put it down and he had Frank about half ways down between them and then he dropped.

Q. How did he drop?

A. Dropped backwards, just like that [indicating].

Q. Well, now when you say that Frank was partly down, just show to the jury how far Frank was down to the ground at the time you saw him.

A. Well, he was just about this way; something like that [indicating] holding him down.

Q. Well, now what—who handled the sword at that time?

A. Itow.

Q. Itow. Is that the defendant over there?

A. Yes, sir.

Q. Now, what were the other two men doing at the time?

A. They were holding him.

Q. Holding who?

A. Frank.

Q. Frank. Now, how were they holding him?

A. Well, they were holding him by the shoulder.

Q. One on each side, or back, or how? In what position were they *were* with reference to Frank; in front of him or behind him or side of him?

A. One in back of him and one in front of him and Itow in the middle.

Q. Well, did Frank say anything or do anything at that time?

98 A. No; not so far as I heard I wouldn't say they did.

Q. Now, then at the time you saw the sword, at the corner of that, in the hands of Itow, what did you do?

A. Well, I just looked at it. I couldn't do anything.

Q. Well, did you remain standing there?

A. Well, as I said, we run over toward where Frank—where they were stabbing him.

Q. Well, how close to Frank did you go?

A. Oh, about 10 feet.

Q. Well, did you look at Frank?

A. Yes; after he dropped.

Q. After he dropped. Now, what became of Itow and the other boys after Frank dropped?

A. Well, he went up this gangplank there.

Q. Who did?

A. Itow.

Q. Itow did?

A. Yes.

Q. What did he do there?

A. Why he said to the fellows in there—I didn't see the fellows in the door, but he wanted them to come out and fight. "I am the man that killed him," he says, "now you fellows come on."

Q. What was he doing with his sword when he was standing there on that gangplank?

A. Just swinging it around like that and had the revolver in his left hand.

Q. State whether or not you stopped to find out whether Frank was dead or not?

A. Yes; Carl Waldall—we was all four together and we went
99 right over and Carl Waldall went right over and he put his hand down and he said he was gone.

Q. That stabbing—how long did that take place after the time the revolver was pointed at you?

A. About 15 minutes.

Q. After Itow had taken his position on the gangplank in front of the door swinging his sword, as you have described, what did you do?

A. I was standing right on the corner of the China house looking at him.

Q. Well, how long did you stay there?

A. About five minutes.

Q. Who was with you?

A. I was alone.

Q. What became of the other boys?

A. They went over to call the superintendent and some other fellows in the cabin there to come outside.

Q. Well, now then did you stay over there at that corner until Nelson appeared?

A. I stood over there until he fired the shot.

Q. Until he fired the shot?

A. Yes; I didn't see Nelson because it was kind of dark.

Q. Well, after the shot was fired did you still remain standing there or did you go away?

A. No; I walked away.

Q. Where did you go to?

A. Over towards the Indian town.

Q. (By the COURT.) What shot are you referring to? You said "after the shot was fired." What shot are you referring to?

A. I walked away.

100 Q. (By Mr. RUSTGARD.) Well, who fired that shot you speak of?

A. Itow.

Q. In what direction did he fire it?

A. In through the door.

Q. What became of Itow after that?

A. I didn't see him because I walked away.

Q. You walked away towards Indian town?

A. As soon as he fired the shot I turned around and walked away.

Q. What did you do that for? I want to find out what you did the rest of the night immediately following. How long did you remain over to Indian town?

A. About twenty minutes; stood and talked to the natives.

Q. (By Mr. COBB.) Did what? I didn't catch the last.

A. I was talking to the natives.

Q. (By Mr. RUSTGARD.) Then where did you go to?

A. I went back over to Nelson's house.

Q. Nelson's house. What was going on there?

A. Well, there was a fight over there and that was all over when I came down.

Q. It was all over when you came there?

A. Yes.

Q. At the time you came up to Frank's body and Carl Waldall said "He is gone," in what position was the body lying?

A. On his back.

Q. In what direction was the head lying?

A. Toward the incline.

Q. Toward the incline. How far away from the incline was it?

A. About—

Q. Measure it off on the floor here.

101 A. I judge about twenty feet.

Q. Measure it off on the floor where the jury will see. Suppose this is the incline where this table is; how far from the incline was the body lying? Step down and show the jury, as near as you can.

A. Well, from the table over to where them fellows are sitting.

Q. How large a man was Frank Dunn?

A. I can't tell exactly. He was just a little taller than I was.

Q. Well, how did he compare with you in size otherwise?

A. Well, he was a little stouter.

Q. A little bit stouter. Was he smooth shaven or had he a beard?

A. He was smooth shaven.

Q. Smooth shaven. Was he fleshy, or was he rather lean—in the face, I mean?

A. No; he wasn't very fleshy; just medium.

Mr. RUSTGARD. Take the witness.

* * * * *

167 MANUEL ARA, being called and duly sworn, testified as follows on behalf of the Government, to wit:

Direct examination:

Mr. RUSTGARD. Manuel, come up here. I would ask at this time that Mr. Kennedy be sworn as an interpreter. Mr. Kennedy, will you be sworn to interpret the Spanish into English.

(Whereupon Thomas Kennedy was sworn as interpreter of the Spanish language.)

Q. (By Mr. RUSTGARD.) What is your name, Manuel?

A. Manual Ara.

Q. Now, you talk English all you can.

A. All right.

Q. If you can't talk it in English why Mr. Kennedy will interpret it for you.

A. All right.

Q. Where were you working last summer?

A. I work in Dundas Bay cannery.

Q. Who were you working for?

A. For the Japanese contractor and Alaska packers.

Q. Now, where did you hire out?

A. In—what?

Q. What place did you—at what place did you come from when you came to—

A. San Francisco.

Q. San Francisco?

A. Yes.

Q. Did you hire out at San Francisco—make a contract at San Francisco to work?

A. Yes; and one Japanese, he been in San Francisco, find
168 the men send down cannery work from there without work.

Q. Who was that Japanese?

A. Well, I don't know the name was.

Q. Who was your foreman or boss up at the Dundas Bay?

A. One Japanese, named Itow.

Q. Is he here in court?

A. Yes.

Q. Well, where is he?

A. This fellow left side there.

Q. That is him?

A. Yes.

Q. Now, what nationality are you, Manuel?

A. Porto Rican.

Q. Porto Rican. You speak Spanish?

A. Yes.

Q. Now, were there other Spanish speaking people there?

A. In the room.

Q. At Dundas Bay?

A. Yes, sir.

Q. How many?

A. About eight men, or nine.

Q. Eight or nine?

A. Yes.

Q. Were they Porto Ricans or Mexicans?

A. Mexicans.

Q. Mexicans?

A. Yes.

Q. Now, what time did you come to Dundas Bay?

A. Well, I can't remember what day coming up.

Q. What month was it?

169 A. What month? I can't remember what month coming down there.

Q. Did you come up on the same ship with Itow?

A. No.

Q. No. Did you come before or after Itow?

A. After; he coming after; yes; this fellow come first him.

Q. How is that?

A. These fellows come first him.

Q. Oh, they come before you?

A. Yes.

Q. Were you up there during the month of July?

A. Yes, sir.

Q. You were there, then. Now, what house do you sleep in?

A. I sleep in the—there is one house is a new house and they—the new house is there.

Q. The new house. What do they call that house?

A. They call it, you say?

Q. Do you know what they call that new house?

A. What the name?

Q. Yes.

A. I don't know the name.

Q. What they call it. Will you look at this picture, Manuel?

A. That is the one.

Q. That is the one, is it?

A. Yes.

Q. Now, what do you think?

A. Well, I live in this room here.

Q. Is that the room you lived in?

A. Yes.

Q. The room that is marked "Dunn's room"?

A. (Indicates on plat.)

170 Q. What is this big room here?

A. That is the floor.

Q. That is the floor; yes. What do you use all that room for?

A. This is the mess.

Q. The mess?

A. Yes.

Q. You ate there?

A. Yes.

Q. Well, now, how many men were in that room marked "Dunn's room"?

A. Be eight.

Q. Eight. Who were they?

A. I and seven Mexican men.

Q. Dunn and seven Mexicans?

A. Me and Frank and six Mexicans; eight were there.

Q. You and Frank and six Mexicans?

A. Yes, sir.

Q. All right. Now, did you—did you see Itow on the night of the 14th of July?

A. Yes, sir.

Q. Well, now, tell these gentlemen where you saw him first that night.

A. Well, Itow that night he go in his room about nine, about nine o'clock, and he looking for any man that is in bunk, and he don't find Frank there. He call him, "Where is Frank," and the people says to him: "Frank, he no coming yet," and him say nothing more, he just coming outside; then and after he has, after ten in the night

Frank was coming his bunk and he was going his bunk and
171 Frank he go out to water-closet across right to the floor and hear somebody knocking at the door.

Q. Now, who was this man that came there looking for Frank at about nine or half past nine?

A. This fellow there.

Q. Itow?

A. Yes.

Q. Were you in this room at the time Itow came?

A. Yes; the fellows there.

Q. And the rest of them?

A. Yes.

Q. But Frank was not there?

A. He—he was talking to the white fellows.

Q. Itow was the fellow you said came and asked where Frank was?

A. That is the one.

Q. And the boys said: "He hasn't come yet"?

A. Yes.

Q. Now, after that and about, you think, about half past ten that night?

A. Half past ten or twelve o'clock; I can't recall that.

Q. Half past ten or twelve o'clock?

A. Yes.

Q. Frank came into his room?

A. Came in his room.

Q. And then he went to the water closet?

Mr. COBB. Object to it as leading the witness.

Mr. RUSTGARD. Just repetition of what he said.

Mr. COBB. It isn't repeating it.

The COURT. I think it is repetition, as I understand the testimony, it is simply repetition.

172 Mr. COBB. Well, I didn't so understand it.

The COURT. Which part, Mr. Cobb?

Mr. COBB. Said he came into his room and then went to the water-closet. He said went to his bunk first. I appeal to the record. He said to his bunk first.

The COURT. May be a question that he went to his bunk, that he went to the room or to the water-closet; may be that little in difference, which I consider immaterial.

Q. (By Mr. RUSTGARD.) How long was Frank in his room before he went to the water-closet?

A. How long?

Q. Yes.

A. About nothing, or nothing long time, about two, about five minutes.

Q. Five minutes?

A. Yes.

Q. Now, where is the water-closet?

A. It is right there. This one.

Q. Yes. Now, you said something to the effect that when Frank came back from the water-closet somebody knocked on the door?

A. Yes.

Q. Now, where is that door that somebody knocked on?

A. Right here is one, this.

Q. Where were you at that time?

A. On the floor.

Q. Whereabouts?

A. This one.

Q. In that mess room?

173 A. Yes.

The COURT. Now, it is impossible for some of the jurors to see by reason of the position of the witness. I want to say further this to the jurors: If at any time you don't understand the testimony that is being given either by this witness or some other, I want you to speak up, so you won't misunderstand anything that you should understand. Just raise up your hand and let me know. Go ahead.

Q. (By Mr. RUSTGARD.) Now, where was Frank when you sat on the floor?

A. He was in the mess room right on the floor.

Q. How far was he from you?

A. About 10 or 15 feet.

Q. Well, when somebody knocked on the door, what did Frank do?

A. Well Frank, he says: "Who is there?" and the Japanese say: "Me;" and that time the Japanese say "Me," Frank he say: "Who me;" the Japanese say: "Open the door;" say, and that time Frank open the door, the Japanese came in there right on the floor ask to him and said, "I want you to quit there, Frank."

Q. "Why should you quit?"

A. And Frank say, "Why because you want to quit, Frank?"

Q. And what?

A. Frank—want to get away.

Q. That is what I mean.

A. Yes; and Frank say, well he can't go away, because he have got nothing, and at that time—this at that time you see in there the Japanese say, "Come, you do that before, and that time you do go before;" then Japanese pull him outside and that other fellow.

174 Q. Now, who was that Japanese that came in and knocked on the door there?

A. This fellow right on the room.

Q. Ed. Fushimi?

A. Started ahead; yes.

Q. Now, suppose I am Frank and you are Ed. Fushimi—that is the Jap?

A. Yes.

Q. Show the jury how the Jap acted?

A. Well, that time these fellow talk to him, and he was about that time he pull him like and do like that and pull him outside mighty strong, that.

Q. Just take hold of me just the the way he did. Take hold of me and show the jury.

A. He was talking to him like that, and that time go outside he do like this, pull him.

Q. And where did they go then?

A. He go to and fall down.

Q. Well, now point out to the jury what became of him after they went out the door?

A. Well, Frank he was down right here, see, right here.

Q. That is where he was standing?

A. Yes; right here, see, right this side Frank was standing and this fellows all there closing like to them.

Q. Now where did they go when they went out?

A. They coming this way through this way and fall down; fall down right here.

Q. Now, stand aside so the jurors can see where they fall down?

A. Right here.

175 Q. What happened there? What did they do there?

A. Why, that time along, along right here this fellow let down on the ground there, and that time as these fellows let down on the ground and this fellow jump to him and he got a big spear in his right hand and he go jump to him and kill him right away.

Q. Now, what did he have in his right hand?

A. A spear, a knife.

Q. How big?

A. Oh, a big one.

Q. Now, who was it that held that knife?

A. This fellow.

Q. Itow?

A. Itow.

Q. Now, Manuel, will you look at this knife here. How does that compare in size with the one that Itow had?

A. Yes; Itow have this way he hold same this way with the knife.

Q. How did he do to him?

A. And that time there Frank's there kill down on the ground; Itow do like that; see.

Q. What did Frank do then after that?

A. What did he do. He no give no chance, you see; he don't give no chance to him; he die right away.

Q. What did Itow do after that?

A. What?

Q. What did Itow do after that?

A. After that—after the killing?

Q. Yes.

A. Oh, before, before, if you do not recollect, before he go
176 and say "Frank" to him in the room.

Q. Well, now you don't understand me. Just come up and take your seat, Manuel. How long before that killing was it that Itow was in Frank's room looking for him?

A. How long, you say?

Q. Yes; how long before the killing was it that Itow was in Frank's room and asked for him?

A. About one hour, sir.

Q. About one hour. Now, after Frank was stabbed, where did Itow go to?

A. What did Itow do?

Q. Why, what did he do afterwards?

A. Why, just go there and find to him in the room.

Q. You don't understand the question after the stabbing?

A. Oh, you say after the killing?

Q. Yes.

A. Oh, after the killing; well, he come in right in front of door there that time he come right in front of the door here and Japanese—the Mexican foreman talking to him, why, why, do killing this fellow, and him answer to the foreman he kill him you, too, and that time he kill you, too, the time he shot, he don't catch any of these fellow—catch the other fellow, Costillo.

Q. He didn't catch the Mexican foreman. He caught the other fellow?

A. Yes; he don't catch him. He catch the other.

Q. Do you remember what Itow said first when he came in front of the door after the killing—I think, Mr. Interpreter, you had probably better explain that to him—what was the first thing Itow said after the killing, when he came on the incline in front of the door?

177 A. Well, yes; he say, just that fellows come in and talking to him that fellow do just the same; he kill him just the same way.

Q. Well, after the killing there, when Itow first came up on the incline, on the steps leading to the doorway, what was the first he said?

A. What did they first say?

Q. Yes.

A. After the killing?

Q. Afterwards.

A. Well, the Mexican first he call to him first, and he says, "What you kill the fellow?" Itow answer; he say: "Well, I kill him; you too," and that time he say, "I kill you, too," and he get holler, and he showed that spear to him.

Q. Did Itow say anything to him before the Mexican foreman spoke to him?

A. No; I don't hear anything.

Q. You don't hear that?

A. It was after the Mexican foreman talking.

Q. Did Itow have that sword in his hand at the time the Mexican foreman spoke to him?

A. Yes; he got a spear.

Q. He got that spear; and in what hand did he hold that spear?

A. Yes, he was; and he do like that way [indicating], and that time the Mexican foreman say, "What you kill this fellow?" he say, "I kill you, too," go like this—he show it to him.

Q. How many were standing in the doorway at that time?

A. Three fellows.

Q. Who were they?

A. Me and Costillo and Mexican foreman.

178 Q. Well, where is the Mexican foreman now?

A. Well, guess gone to Mexico now they fight this fellow.

Q. Well, he left since?

A. What?

Q. He left since the killing; he left?

A. Where is they been?

Q. Yes.

A. After the killing?

Q. Yes.

A. Oh, he gone in Mexican and the China storeroom after the shooting him.

Q. Now, where, what time did you leave the cannery?

A. What time I leave the cannery?

Q. Yes, and come to Juneau?

A. Come to Juneau?

Q. How long after?

A. 16th—17th of July.

Q. 17th of July—three days after the killing?

A. Yes.

Q. You came with Frank's body?

A. What?

Q. You came together with Frank?

A. Yes; we came together; yes.

Q. Frank came at the same time?

A. Yes.

Q. And Itow? That is the one. Was Costillo on the same boat?

A. No; Costillo, superintendent sent to hospital.

Q. Costillo was sent to the hospital?

A. And after he was out of hospital, and they call him, hollering to him.

179 Q. Well, I want to find out—just tell the jury where you have been since that time; where you lived; where you have lived since that time?

A. Well, in the jail.

Q. In the jail?

A. In jail, yes; and about five months and 17 days to-day.

Q. Held as a witness?

A. Yes.

Q. Costillo in jail, held as a witness?

A. Yes.

(Whereupon court took a recess of five minutes, at which time all parties being present and the jury in the box, further proceedings were had, to wit:)

Q. After Costillo was shot what did you and Costillo do?

A. What did Costillo and me do?

Q. Yes.

A. Costillo he and after the shoot Costillo he go; he want us go superintendent's house, and I go and Costillo in the China storeroom.

Q. How long did you stay in the Chinese storeroom?

A. Oh, a long time, about two hours.

Q. (By Mr. FOLSOM.) You didn't go to the superintendent's house?

A. No, no; not me.

Q. (By Mr. RUSTGARD.) What did—what did the Mexican foreman do after Costillo was shot?

A. He go in there to, and I go in there, and the Japanese and somebodies, he says—I don't—I don't see these—he is call me Costillo and him.

The COURT. He is testifying to something else.

Mr. RUSTGARD. That is all.

The COURT. Cross-examine.

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202 HENRY ADAMS, being called and duly sworn, testified as follows on behalf of the Government, to wit:

Direct examination:

Q. (By Mr. RUSTGARD.) What is your name?

A. Henry Adams.

Q. What is your business?

A. Why, it is carpentering.

Q. Carpenter?

A. Yes, sir.

Q. Where were you last summer?

A. Dundas Bay cannery.

Q. You are the cannery carpenter?

A. Yes, sir.

Q. Where did you live at the cannery?

A. I lived in the bunkhouse.

Q. What bunkhouse?

A. The white men's bunkhouse.

Q. Upstairs or downstairs?

A. Upstairs.

Q. Upstairs. Who was the cook there?

A. The cook?

Q. Who was the cook?

A. Carl Waldall, I believe his name is.

Q. Carl Waldall, one of the witnesses here?

A. Yes, sir.

Q. Now, did you know Frank Dunn?

A. Well, I got acquainted with him there last summer.

Q. You got acquainted with him last summer out there?

A. Yes, sir.

203 Q. You didn't know him before?

A. No, sir.

Q. Do you know this defendant, Itow?

A. Why, I seen him around the cannery there. I never spoke to him.

Q. Do you know what position he occupied at the cannery?

A. Yes; they called him the foreman; Japanese foreman.

Q. Have you seen this man Fushimi before?

A. Yes; I have seen him there, too.

Q. What time did you come to the cannery?

A. First day of April.

Q. First day of April?

A. Yes, sir.

Q. What boat did you come on?

A. Why, went over there on a boat—on the cannery boat; I don't know just the one.

Q. Did you come in company with those two boys?

A. No, sir.

Q. Did you come before or after them?

A. I come before they come.

Q. How long?

A. Why, I guess about a month or three weeks; something like that.

Q. Now, did you see Ed Fushimi on the evening of the 14th of last July?

A. Yes, sir.

Q. Where did you see him?

A. Why, I seen him coming along a plank walk from their bunk-house over towards our bunkhouse, and he come upstairs where I was.

204 Q. What time of the day was that?

A. Why, it was about eight o'clock in the evening, I think; it was after supper I know.

Q. It was after supper. Was there anybody else present at the time?

A. No, sir; I was sitting at the window by myself.

Q. What?

A. I was sitting down by the window there alone at that time.

Q. At that time where was Itow? Did you see him?

A. Yes; he stayed downstairs; he come along the walk with Fushimi. He stayed downstairs. He didn't come. He stopped on the plank walk.

Q. Itow remained downstairs?

A. Yes, sir.

Q. And Fushimi came up?

A. Yes, sir.

Q. Do you know whether they come to the bunkhouse together?

A. They come over as far as the corner of the bunkhouse together; yes.

Q. Do you know whether they went off together or not?

A. Well, the last I see of them they were going towards their quarters together.

Q. They were?

A. Yes.

Q. Now did Fushimi say anything to you at that time?

A. Yes, sir.

Q. What did he say?

A. Well, he didn't say much.

Q. Well, state what conversation you had with him, if any?

A. Well, he asked me if I had seen anything of Frank, that white man working for them.

205 Q. What did you tell him?

A. I told him no; hadn't seen him.

Q. Well, what did Fushimi say then?

A. He says he is trying to get away from us, and we are looking for him, and if we catch him we will kill him.

Cross-examination:

Q. (By Mr. COBB.) What time did you say that was in the——

A. About eight o'clock in the evening.

Q. Did you report that to anybody?

A. I didn't right then; no.

Q. What?

A. I didn't right then; no.

Q. When did you?

A. The next day.

Q. The next day. You didn't go to the superintendent about it?

A. I didn't right then; no.

Q. Or make any effort to have them stopped?

A. Well, I told this Frank Dunn a little bit after that about it.

Q. What is that?

A. I seen Frank outside and called him up and told him about it.

Q. You didn't go to the superintendent about it?

A. No, sir.

Q. You didn't make any effort?

A. I didn't know whether he meant it or not; I thought he was joking or something about it.

Mr. COBB. That is all.

206 Mr. RUSTGARD. That is all.

The COURT. We will take an adjournment then at this time until ten o'clock to-morrow morning, and I wish the jurors will remember well all that I have had occasion to say to you the other day, during your absence from court.

(Thereafter at ten o'clock a. m., January 6, 1913, court again convened, the parties being present as heretofore and the jury in the box, whereupon the following proceedings were had, to wit:)

* * * * *

210 FERDINANDEZ CASTILLO, being called and duly sworn, through the interpreter, Mrs. Lee Pulver, who was duly sworn to act as interpreter, testified as follows on behalf of the Government, to wit:

Direct examination:

Q. (By Mr. RUSTGARD.) What is your full name?

A. Fernandez Castillo.

Q. What nationality are you, Castillo?

A. Mexican.

Q. How long have you been in America?

A. Two years.

Q. Where did you work last summer?

A. In California.

Q. Last summer?

A. In California.

Q. Well—I mean did you work anywhere in Alaska last summer?

A. Yes.

Q. Where did you work in Alaska?

A. Work in a cannery with a Japanese company.

Q. I can't hear.

Q. He says he worked at a cannery with a Japanese company.

Q. Do you know the name of the place where you worked?

A. Dundas Bay.

Q. Dundas Bay. Mrs. Pulver, will you speak loud enough so all these gentlemen of the jury can hear you. What time did you come to Dundas Bay?

A. About the 21st of April.

Q. About the 21st of April; last April?

A. Yes.

211 Q. Castillo, will you look at this picture here? Have you ever seen the house of which this is the picture? Do you know what that is?

A. Yes.

Q. Have you ever seen the house of which that is the picture?

A. Yes.

Q. What is that house?

A. That is the place where they used to sleep.

Q. At what place? Down in California?

A. At Dundas Bay.

Q. Dundas Bay?

A. Yes.

Q. Now, did you sleep in that house last summer at Dundas Bay?

A. Yes.

Q. Did anybody else sleep in that house?

A. He says Chinamen and Mexicans slept there besides himself.

Q. How many men slept in that house?

A. He says—one—he says about eight Mexicans slept and the rest was more or less twelve Chinamen.

Q. Twelve Chinamen, more or less?

A. Yes; I don't remember how many Chinamen.

Q. You don't remember how many Chinamen? Well, now, what is this picture you look at now, this Exhibit Plaintiff's No. 2? Is that the room where you sleep?

A. Yes; that is where I slept.

Q. Well, now, who else slept in that room?

A. There was in that room there was seven Mexicans and one American, he says.

Q. Now, among those seven Mexicans do you count Manuel?

A. Yes.

212 Q. He is a Porto Rican?

A. A Porto Rican, yes.

Q. He passes as a Mexican?

A. Yes.

Q. Now, do you remember the night of the 14th of July?

A. Yes; I remember.

Q. You remember that?

A. Yes.

Q. Did you see those two defendants there that time?

A. Yes.

Q. See Frank there?

A. Yes.

Q. Well, after supper that night when did you first see Itow?

A. Well, he says from six to seven, about, he seen him outside that house.

Q. Did you ever see Itow after that time?

A. He says he seen him about nine or ten; he came in and asked for Frank.

Q. Yes; now, where did Itow come at the time he came and asked for Frank at about nine or ten o'clock, what room?

A. He came in that room [indicating].

Q. Who were in that room at that time?

A. He says they were all there except Frank, the one he was looking for.

Q. Did Itow say anything when he came into the room?

A. He says he asked for Frank.

Q. How long after that did you see Itow again?

A. He says he didn't see him no more after that until he kill the man, then he seen him.

Q. Well, did you see Ed Fushimi that night after Itow had
213 been in the room looking for Frank?

A. He says he seen him when he came to knock at the door to ask for Frank.

Q. Now, what time was it that Ed. came and knocked at the door and asked for Frank?

A. Ten o'clock or half past ten or twelve.

Q. Possibly ten and possibly twelve. How long was that after Itow had been in the room looking for Frank?

A. About an hour and ten minutes.

Q. (By Mr. Conn.) How long?

A. About an hour and ten minutes.

Q. (By Mr. Rustgard.) Now, where were you when Ed. knocked at the door?

A. In the room.

Q. In the room. Now, what door did Ed. knock at? Point to the door.

A. This [indicating].

Q. Down there. Can you point to it on that picture?

A. (Witness points to picture.)

Q. That door. Now, what did you do when you heard Ed. knock at the door?

A. He says the door knocked rather loud, then he went out to see who it was.

Q. Who went with you?

A. He says him and the Mexican boss that was there.

Q. Well, where was the Mexican boss at the time Ed. knocked on the door? Which room was he in?

A. In that room [indicating].

Q. Now, when you and the Mexican boss came into the mess room, the big room, what did you see and hear? Tell everything about it.

214 A. He says that him and this Spanish just went to the door when they were knocking, and then this Frank got there just as they got to the door from the room, too, and he asked the Japanese what he wanted, and he says "Open the door."

Q. Well, what did Frank do after the Jap says "Open the door"?

A. He says he asked him what he wanted, and the Japanese said he was taking care of him that night, so he wouldn't go; and Frank says how did he expect him to go when he didn't have any gasoline or anything to go away on.

Q. Well, what happened after that, and what was said after that?

A. He says the Jap swore at him and gave him a push—pushed him out.

Q. Well, now, suppose I am Frank, now, and you are the Jap; show just how he did it.

A. (Witness indicates.)

Q. Well, where did Frank go to then. What did he say next?

A. He says he pushed him; Frank fell to the ground on the other side.

Q. On what side?

A. The left side.

Q. Well, what happened there?

A. He says after the Jap pushed, he said the other Japanese jumped on top of him and stuck the sword into him.

Q. How big a sword was that?

A. Oh, he should think about that big [indicating].

Q. How many Japanese were there out near Frank at the time that sword was stuck into him?

A. He says there were these two Japanese, and further to the front was a crowd of men he didn't know.

Q. They were?

215 A. A few men in front, he didn't count the Japanese, but just these two at the time the sword was stuck.

Q. Have you ever seen that before?

A. He says he seen that.

Q. Where have you seen it?

A. He seen it; one of the Japanese have it in his hand.

Q. Does that look like the sword that Itow had that night?

A. Yes; he says it looks like it.

Q. Well, now, show the jury how Itow handled that sword when he stuck it into Frank?

A. (Witness indicates.)

Q. After that what happened?

A. He says after he stabbed the man he got on these steps there, and then he had a revolver in his hand, and crossed his revolver and the sword this way [indicating] in his hand.

Q. Well, did he say anything when he was standing there?

A. He says he when he stood there and like that the Mexican boss came to the door and says, "What is the matter? What did you kill that man for." and he says, "If you don't be careful I will kill you, too," and he shot then, and he was the one that got the shot.

Q. Where did he shoot you?

A. Here.

Q. Turn around and show the jury.

A. (Witness indicates.)

Q. After that what happened?

A. He says he went into the Chinamen's room after he shot, and after he left them there; as after he was shot he went into the Chinamen's room and the Chinaman went out, then, to get an account of what had happened to him.

Q. Well, now, how long did you stay in the Chinaman's room?

216 A. He was there about 10 minutes.

Q. Where did you go from there?

A. He says after that he went to the superintendent's house.

Q. Now, who else went to the superintendent's house at that time?

A. Him and the Mexican boss.

Q. Did any other Mexicans go to the superintendent's house that night?

A. He didn't see any more himself.

Q. Did any of the Chinamen go to the superintendent's house that night after the shooting?

A. He says the superintendent—the Chinamen went first and then after the Chinamen the head Mexican went and then after the head Mexican he went himself.

Q. Did you—did you see that night any other Chinamen or any other Mexicans at the superintendent's house?

A. No.

Q. Did you see any Japanese there at the superintendent's house?

A. He says there was quite a few Japanese there.

Q. Can you say how many?

A. He says he don't know the exact number.

Q. Well, what happened down there?

A. Where, at the superintendent's?

Q. Yes.

A. He says after he was shot he went to the superintendent's house; he says all the Japanese jump onto him and hit him some more.

Q. Did they have you down?

A. Yes.

Mr. RUSTGARD. Take the witness.

* * * * *

230 Mr. RUSTGARD. That is all.

Mr. COBB. Now, if the court please, I am informed by wire that our witnesses will be here on the "Dolphin;" left Seattle Satur-

day morning at 10 o'clock. The defense will not be prepared, of course, to go on with this case until the witnesses get here.

The COURT. You have no witnesses you can put on in the meantime?

231 Mr. COBB. No, sir; I have not.

Mr. RUSTGARD. I will ask the defense put the defendants on in the meantime.

Mr. COBB. Whether or not I put the defendants on or not, you very well see, depends on my own judgment in the matter.

The COURT. The "Dolphin," do you know whether or not it is due?

Mr. COBB. I haven't heard this morning. As I stated very frankly to the court that I shall want an opportunity after the arrival the boat; the witnesses are Japanese and Chinese; I am informed they don't speak but very little English, some of them at least, and the nature I don't know only in a general way, and especially in the examination of a witness of that kind I think it would be very unfair to the defense to compel me to put them on immediately upon their arrival until I have an opportunity of seeing what their testimony is and presenting it to the jury in an orderly like way.

The COURT. That can be done in the very shortest possible time.

Mr. COBB. As soon as it can.

The COURT. Be given a reasonable length of time, but, as I stated in advance, that I shall expect you to use your utmost effort.

Mr. COBB. I don't think the court can complain of us.

The COURT. I am not complaining, but only stating the facts.

Mr. COBB. Yes, sir; throw nothing in the way of a speedy trial, of course, but I do insist on giving them a reasonable opportunity to make their case.

232 The COURT. We will have to take a recess in this case, gentlemen of the jury, as far as I know now, until the arrival of the "Dolphin;" that is, with the expectation she will arrive sometime and within a reasonable time. Is there any possibility that the "Dolphin" will be here to-morrow morning?

Mr. RUSTGARD. The "Dolphin" was, of course, due to leave Thursday night, but that was postponed I suppose for the reason that the attorneys and the defendants in the transportation case are on board; so doesn't leave until Saturday morning, and she is due Tuesday night.

The COURT. Then, I think, no use of asking the jury to report here until Wednesday morning at ten o'clock.

Mr. COBB. If she doesn't get here until that date I think might just as well let it go over until a later date; can conclude this week anyway. If gets over here that night, Tuesday night is the earliest that boat can get here, and I will not be able to see these witnesses before Wednesday, and I think it should go over at least until two o'clock, perhaps be better to go over until Thursday morning.

The COURT. Well, I will let it go until two o'clock instead of ten. The jury will report then Wednesday at two o'clock. I don't think

it is necessary to go over what I have said to you about your deportment and the necessary deportment of others toward you with reference to this case. I won't do it. I will just ask you again, as judge of this court, to bear it in mind and assist the court that there is a fair, impartial trial in this case. We will be at recess, so far as the court is concerned, until two o'clock this afternoon, and you gentlemen report at two o'clock on Wednesday afternoon.

233 (January 8, 1913, two o'clock, court convened pursuant to adjournment; present, the parties as heretofore, the jury in the box further proceedings were had, to wit:)

The COURT. What is the position of the attorneys in the case?

Mr. COBB. The "Dolphin." I learn on inquiry at the steamship office, is expected to arrive to-morrow morning. She will be at Ketchikan this morning; was storm bound before reaching Ketchikan, and, of course, we will not be ready to proceed until a reasonable time after the arrival of the "Dolphin."

The COURT. What time do you believe she will be here so I can excuse the jury until some definite time?

Mr. COBB. I don't know, your honor, that anything would be gained by requiring them in court here before ten o'clock day after to-morrow. There are three of these witnesses, one of whom is a Chinaman I am informed. I never talked to them; that none of them speak anything more than a little bit of pigeon English, such as is needed to carry on the work around the cannery. I will have to talk to them through an interpreter and require, of course, a reasonable time to talk with these witnesses and find out what they know. Can't put them on the stand perfectly at random until I find out what they do know, and I think that I will be ready to proceed if the boat arrives at the time indicated, reported by the steamship office, I will be ready to proceed day after to-morrow morning. I will not take any more time than is absolutely necessary to order to try the case properly.

Mr. RUSTGARD. I understand that the boat reported this
234 afternoon at Wrangell. If so, ought to go through the Narrows on this tide, probably at Petersburg now, which ought to bring here to the island, Douglas Island, a little bit after midnight.

The COURT. Well, I just as leave not commence the case until we are ready, and then we will have to expect to make progress after that time, so probably just as well to begin at Friday morning at ten o'clock, and I shall like to finish the case, if we can, Friday and Saturday. Is there any possibility? Can the attorneys say at this time?

Mr. COBB. I think we can get through doing that.

The COURT. The jurors will be excused until Friday morning at ten o'clock. The jurors will, I expect, remember particularly the instructions I have given them with reference to their conduct outside the court. You are excused until ten o'clock Friday morning.

(Whereupon the further trial of this case was continued until ten o'clock Friday morning, January 10, 1913, at which time court convened pursuant to adjournment, the parties being present as heretofore and the jury in the box, whereupon further proceedings were had, to wit:)

Mr. COMM. I desire to present a motion at this time. I think in view of the nature of the motion that the jury may be withdrawn. The defendants at this time move that this jury be discharged from further consideration of this case. The grounds of the motion I will state that in view of the insistence of the district attorney to take up the case at the time it was taken up before the arrival of the witnesses for the defense and the court compelling us to go to

trial at that time, counsel for the defendants consented that the jury might not be kept together during the four or five days' intermission of the trial which was largely rendered inevitable. Notwithstanding that the court counselled all parties connected with the case, cautioned all parties to be careful, that there might be no impropriety in the conduct of any of the parties connected with the action, the district attorney, on last Monday, and knowing that the jury were not under surveillance but loose all over the town, going about the ordinary avocations, gave out the following interview to the press: "Japanese are accused of many crimes. Federal official tells of cannery conditions. Many crimes committed by alien labor employed in canneries which is not reported to courts. 'It is not at all unlikely that there are more murders committed among the canneries of southeastern Alaska than we have any idea,' said United States District Attorney Rustgard this morning." This is a paper under date of Tuesday, January the 7th, 1913. "Said District Attorney Rustgard, 'There is no question but that among the orientals employed in the canneries the fixed idea prevails that any attempt on the part of one of their workers to abandon his employment is an offense which should be punishable with death.' Last year, at the Weiss cannery, near Shakan, a Korean threatened to leave the cannery. He was an oriental of unusual intelligence and education and could talk in four languages. He had adopted the ways of civilization, and the constant diet of unsalted rice was more than he could endure. He attempted to escape, but was caught. He was murdered, and eight

Japanese took part in the crime. His skull was crushed in with a rock, a pistol bullet was fired through his neck, a stone was tied to his body, and he was thrown into the bay. Had not the sea given up its dead, it is practically certain that the crime would never have been known. But six weeks or two months afterward the body floated. The cannery officials claimed, and the claim was doubtless a truthful one, that he had never been missed by them, and that they knew nothing about the murder. After an investigation by the prosecuting attorney's office they were morally certain of the conspiracy, and the reason the murder was committed,

but there was a failure of conclusive evidence, and so, when one of the Japanese offered to plead guilty to manslaughter, on condition that the other cases should be dismissed, the offer was accepted. Afterwards the fully story of the murder was obtained. The eight Japanese had committed the crime, but the one who confessed had been selected by lot to plead guilty on condition that the others be freed. When a statement was taken by representatives of the prosecuting attorney's office in the Itow case, of the bookkeeper of the cannery, a Japanese, he was asked if he had not himself shot at Frank Dunn about a week before the tragedy for which Itow and Fushimi are now being tried. He said that he had not. He was then asked if, once when Dunn had claimed to be sick, he had not gone to his room to get him to go to work because the cannery needed his services, he had not ended by shooting at Dunn. 'Oh! oh!' said the bookkeeper, with a gesture of impatience, 'Really, I had forgotten it.'

But he insisted that he had not intended to shoot him, but
237 merely to frighten him. For a long time refugees from canneries coming to Juneau have claimed not only that they were held as slaves, but that they were virtually shanghaied at San Francisco and Seattle. Although it is true that most of the unfortunates are either orientals or Mexicans, or in a few cases, Spaniards, it is undoubtedly true that there were other American boys, like Frank Dunn, who, finding themselves impoverished in a strange city, have become victims of the system. And as these would find it more difficult than the others to endure the fare, it is probable that many of the victims buried beneath the waters of the sounds and straits of the inside passage were born on American soil." Of course, I have no means of knowing—it is manifestly improper to make any inquiries as to whether that piece was read by the jury or not, but I feel morally certain some, if not all, of them did read it. The court will note that the heading of it is artfully disguised so not to indicate that in the beginning it relates to this case, and a man picking it up, although he might not intend to read anything about it, would be misled into reading it, the same way that advertisements are gotten up. Not only that, but the article published as it has makes a kind of atmosphere so sinister to the defendants in this case, whose story has never been heard by the public, that I don't believe any man could walk the streets of Juneau, as this jury has done, without feeling this intense atmosphere of hostility that has especially developed since the publication of that infamous article. I desire to say, furthermore, in that connection about it, especially about the shooting, I am informed by the Japanese interpreter that the interpreter
at that time is a man of high character, up in the diplomatic
238 service of his country, and come over to this country. He was doing the interpreting at the time that the statement was made by Itow, and the district attorney had reason to know his statement would be material in this case and the statement was in this way false. I make this motion following the rulings of the Circuit Court

of Appeals of the Ninth Circuit in a civil case in which the misconduct of the counsel was incomparably less than in this case, and that was in a civil case, and the court said the motion that was made should have been granted. I refer to the case of the Alaska Treadwell Gold Mining Company against Cheney, the 162nd Federal, 593.

Mr. RUSTGARD. May it please the court, counsel has read a small article, accrediting it to me and evidently wanting it to go on record as a quotation from myself. The article quotes, I think, six or eight lines from me, and what is quoted I admit is a statement which I made. I submit, however, that I did not make the statement for publication. The conditions under which I made it were substantially as follows: One of the representatives of the paper came into my office and started to talk about something entirely different, touching proposed legislation and the work of the next legislature for Alaska. The conversation drifted over on this particular case, and in that conversation I did make the statement contained in the first six or eight lines in quotations in the article in question. The rest of it was partly probably information gotten from me; partly from others. It is a matter that has been generally discussed at various times, and the court will realize that now, when there are

239 two newspapers in this town, they are both given to getting the scope on the other; for that very reason I have invariably admonished the newspaper men who call at my office daily to refrain from publishing anything with reference to any case that is on trial or that is probably for trial during this term, in order that those who may be summoned as jurors should in no way be influenced. I think this court knows that is the position I have taken in every respect. I do say that I regret that article was published, but I don't believe that it has ever reached any of the jurors. When counsel and myself consented that the jury might be allowed to go or be at liberty during the trial, it was undoubtedly because both counsel and myself personally know the jurors serving on this panel and personally have sufficient confidence in each and all of them to believe that they would in every particular obey the instructions of this court. I dare say that I have taken pains to watch the behavior of all the jurors during the recess of the case, and I have found that they have walked with exceptional circumspection in every particular. For that reason I am satisfied, as I am also satisfied that counsel knows and is convinced, that they have not allowed anybody to talk to them or in their presence touching the case or that they have read any article touching the case. On that I am perfectly satisfied and perfectly confident. The court must also realize that in the present stage in this city where there are two newspapers we must expect that the newspapers are going to publish something concerning the case during the trial, and counsel knew that when he consented to having

the jury not kept together during the trial and he must have
240 consented to it upon the reliance that though there would be articles published touching the case, yet they would obey the instructions of the court and refrain from reading anything on the

subject. Under the circumstances it is evident that if the rule which counsel invokes should be the law, the jury would have to be shut up in every case, because it is impossible at the present time to keep the newspapers from publishing anything concerning a case, although I will say, personally, I have taken the utmost precaution and admonished all of them to refrain from making statements pending the trial and prior to the trial. That is all I have to say, your Honor.

Mr. Cobb. If the court please, I should not be so much concerned about anything that emanate from the newspapers as such. I know, as said by some jurist, that most men pay little attention to that, but here is an article which purports to emanate right from the district attorney's office which evidently did emanate in part from it and which contains matter which could only have come from the district attorney's office involving the secrets of the investigations made concerning this very matter. Not only that counsel is complaining of the newspapers—there is only one of them that I know of that has been guilty of any improper conduct during this term of court; that newspaper is absolutely controlled by this court; since shortly after the failure of the Record-Miner it has been known as an administration organ; it is now being run by a receiver who is an officer of this court and also a guard at the jail, which is within the knowledge of everybody. Its news editor is a brother-in-law of the marshal of

this court. The paper is closely identified with the officers
241 of the Government in southeastern Alaska. Now, that sort of a statement published in a paper of that sort, purporting upon its face to emanate from the district attorney's office, I may state, prevent it from being possible for these men to secure a legal trial before this jury or any other—before any jury gotten in southeastern Alaska. The complaint the district attorney makes against the papers and probably thinks is true to a certain extent. All the more reason why under the circumstances, after the jury being loose here, why he as an officer of the Government should have refrained from giving out any statement to the newspapers for publication at that time. He states that he didn't give it out for publication. All I know about it is his statement and the statement I have taken from Mr. Russell that the interview was a statement from that officer.

Mr. RUSTGARD. Mr. Russell never called on me at all.

Mr. Cobb. I said it was an interview taken by Mr. Callahan. Let that be as it may the wrong has been done and I know no way of righting it except to call a halt as we have.

The Court. Call the jury. Let me take the article which you referred to. The jurors will probably remember that after you were empanelled and sworn in this case the court asked in particular among other things that you refrain from reading newspapers during the trial of this case and if you did read newspapers that at least the parts that might refer to this trial should be removed by your friends or family so that nothing should be read that would touch upon this

trial. It has been brought to my attention that an article ap-
242 peared in the paper called the Daily Alaska Dispatch on the

7th day of January, Tuesday. I will now ask the jurors if any one of them had occasion to read what appeared on that date, an article that was entitled "Japanese are accused of many crimes" and purported to give a history of general conditions about canneries and incidentally touched upon at least one phase of the present case that we are trying. If any juror had occasion to read that I would ask that—it may inadvertently have come into your hand and without knowing it was about this case and you read it; if he did I want you to let me know and you can do that by raising your right hand. I will ask did anybody say anything to you about such an article or in your hearing pertaining to this case or Japanese in Alaska? [None of the jurors respond.] The motion is denied. You may proceed, gentlemen.

Mr. COBB. We reserve an exception.

The COURT. Exception allowed.

Mr. COBB. To the ruling of the court. Before opening the case for the defense in view of the fact that I had no opportunity to talk with the principal witnesses for the defense prior to the close of the case for the Government I have since learned a number of incidental facts which didn't come to my knowledge before. I would ask leave at this time to recall Mr. Nelson for a short further cross-examination.

The COURT. Granted. Call Mr. Nelson.

* * * * *

257 K. OHTA, being called and duly sworn, through the sworn interpreter, testified as follows on behalf of the defendants, to wit:

Direct examination:

Q. (By Mr. Cobb.) What is your name?

A. K. Ohta.

Q. Where were you employed last summer?

A. Dundas Bay cannery.

Q. Do you remember the 14th day of last July, do you recall that day, that day particularly?

A. Yes.

Q. Were the employees of the cannery working that day?

A. Not all day; only one hour and a half in the afternoon.

Q. What time in the afternoon did you say?

A. Yes; a moment please. Bushel machine only.

Q. What time in the afternoon was it that this hour and a half's work was being done?

A. I think beginning one o'clock.

Q. They worked then until about half past two?

A. Yes, sir.

Q. Did you observe any drinking going on among the Mexicans and fishermen that day, around the cannery?

A. Yes.

Q. Was it in the afternoon or evening or in the morning that he noticed it?

A. In the afternoon.

Q. Did you notice or did you hear anything said about the Mexicans celebrating a holiday or saint's day?

A. No; I did not.

Q. Now, where did he stay, sleep; where was his sleeping quarters?

258 A. The bunkhouse, he says.

Q. Which bunkhouse?

A. Japanese bunkhouse.

Q. Now, which way was the Japanese bunkhouse from the China bunkhouse?

A. Toward the hills.

Q. Now, I will ask you to step down here just a minute. Now, point out on Plaintiff's Exhibit No. 2, this plan here, which way was the Japanese bunkhouse from this China bunkhouse?

A. This way.

Q. Down the plan from it?

A. Yes.

Q. Then the incline that is shown on this plat ran down towards the corner of the Japanese bunkhouse?

A. One corner of the Japanese bunkhouse.

Q. Yes.

A. No; bunkhouse in front. This faced toward the front of the bunkhouse.

Q. Now, I call your attention to the photograph that is submitted in evidence, and I will ask you how far from the end of the walk shown there was it to the Japanese bunkhouse?

A. I didn't catch that.

Q. How far was it from the lower end of the incline walk shown in the photograph, was it to the Japanese bunkhouse? Indicate here in the courtroom what is the distance, if you don't know the number of feet?

A. If you walk towards the Japanese bunkhouse would be about—about this room and a half, he says, of this room.

Q. About this room and about half as much more?

A. Yes.

259 Q. And the Japanese bunkhouse is up on the mountain side or hillside like?

A. Yes.

Q. What time did you go to bed that evening?

A. Seven or half past seven.

Q. Were you awakened any time later in the night?

A. Yes.

Q. About what time was that?

A. About half past eleven or eleven o'clock, he says.

Q. What was it that awakened him?

A. The noise outside.

Q. What sort of noise?

A. Why, some of the boys said wake up.

Q. Did they tell him what wake up for; say anything else?

A. They said fighting going on.

Q. Did he get up?

A. I beg your pardon.

Q. (By the Court.) Did you get up?

A. This man?

Q. (By Mr. Cobb.) Yes.

A. Yes.

Q. Did you dress?

A. No; I went out without dressing.

Q. Where did you go to?

A. Just outside the door.

Q. What did you see there then?

A. I couldn't see clearly, but somebody making noise.

Q. Whereabouts?

A. China bunkhouse.

Q. What sort of a noise was it?

260 A. I don't remember what they said; I couldn't hear well, you know.

Q. Well, then what did he do?

A. I put on my shoes and pants.

Q. Did he go back to his room first?

A. Yes.

Q. After he dressed, then did he come out again?

A. Yes.

Q. Then what did he see?

A. I saw the same thing.

Q. Where did he go to when he came out?

A. Mr. Nelson's house.

Q. Went to Mr. Nelson's house. Did he go down there at once?

A. Yes.

Q. What did he go down to Mr. Nelson's house for?

A. I want to tell him the fight going on.

Q. When you got down there, who did you see when you got down to Mr. Nelson's?

A. China—I saw China boss and Mr. Nelson there.

Q. Anybody else?

A. If I remember right I saw—I have forgotten the man's—the cook; night watchman; night watchman and cook.

Q. They have a night watchman at the cannery there then?

A. Yes.

Q. Now, did you see Mr. Nelson?

A. Yes.

Q. Where was Mr. Nelson when he saw him?

A. I was around the ground and Mr. Nelson was at the door, or near the door, of his house.

Q. Was Mr. Nelson dressed at the time?

A. I think he was, but I can't say for sure.

261 Q. Now, how long did you stay there?

A. This man?

Q. Yes.

A. I wish they would ask direct.

The COURT. I think that is better; eliminate the interpreter.

Mr. COBB. I know. It is exceedingly difficult to put in testimony through an interpreter.

Q. How long did you stay there?

A. Only a few minutes.

Q. Well, did you say any fight or any row of any kind before you left?

A. Before I left Nelson's house?

Q. Left Nelson's house?

A. No.

Q. Where did you go to when you left Nelson's house?

A. Came home, he says. I came home.

Q. What does he mean by "home"?

A. My bunkhouse; Japanese bunkhouse.

Q. During this time when you were out did you see Itow at all?

A. No.

Q. Did you see Fushimi?

A. I saw Fushimi in the room.

Q. Before you went down?

A. Yes.

Q. Was it Fushimi that awakened you?

A. Yes.

Q. On your way down to Mr. Nelson's did you met anybody on the side walk?

A. I might. I don't remember.

262 Q. When you first came out, did you look towards the China bunk house at the noise that was going on?

A. Came out of the bunk house?

Q. When you came out of the bunk house did you look toward the China bunk house where this noise was going on?

A. Yes.

Q. Did you see any men over that way?

A. Yes.

Q. Can you tell who they were?

A. It was dark, so I could not see very well.

Q. Can you tell about how many there were?

A. I can't tell: there are lots I know, but I can't tell; near the door of the China house.

Q. Now, then, when you came back to your bunk house, Japanese bunk house, what was the next thing that you did?

A. Repeat, please.

Q. When you came back after you came back from Mr. Nelson's and went into the China bunk house, to the Japanese bunk house, what did you do then?

A. I woke the rest of the boys up.

Q. Did you leave the Japanese bunk house again that night?

A. Yes.

Q. Where did you go to?

A. Nelson's house.

Q. Anybody go down with you?

A. No.

Q. When you got down to Mr. Nelson's house the second time who did you see?

A. I don't remember but seeing Mrs. Nelson was there.

Q. Was Mr. Nelson there?

A. No.

263 Q. Didn't see him there. Did you see any one else around?

A. I don't remember; don't know.

Q. How long did you remain up there this time?

A. Just a little while.

Q. Then where did you go to?

A. (Interpreter. I don't know whether he answered, but I will say what he said.) While I was at Mr. Nelson's place I heard noise toward the China house, and then afterward I heard a shot fired. That is what he says; he didn't answer, you know.

Q. You say that when you were down to Mr. Nelson's house the second time you heard a noise towards the China bunkhouse and heard a shot fired?

A. Yes.

Q. Then what did you do at that time?

A. I went back to bunkhouse, Japanese bunkhouse, thinking that I had better protect myself.

Q. Did you stay in the Japanese bunkhouse then?

A. Why, just a little over there.

Q. Where did you go to then?

A. Again I went to Mr. Nelson's house.

Q. And when you got back to Mr. Nelson's house what did you see? Just tell what happened.

A. Lots of people there.

Q. Well, what were those people doing? Just tell what was going on.

A. Well, they were noisy; they were noisy.

Q. Just—what sort of noise were they making?

A. Well, Nelson saying to them stop.

Q. Well, what were they doing that he was saying stop to them?

264 A. They were fighting. Mr. Nelson want it stopped.

Q. Now, ask him who was it that was fighting; if he knows.

A. Itow and Mexican.

Q. Do you know what Mexicans they were?

A. One of them, I remember Gilbert; is man by the name of Gilbert, he says.

Q. Do you remember any others?

A. Don't remember.

Q. Do you know the names of those Mexicans over there? Do you know the names of those Mexicans over there?

A. Yes.

Q. Remember whether Manuel was there or not, Manuel Ara?

A. I don't recollect.

Q. About how many Mexicans was down there?

A. Nine.

Q. (By the COURT). Does that question mean there in the fight?

Q. (By Mr. COBB). In the fight, yes.

Q. (By the COURT). Ask it over again.

A. I don't know.

Q. (By Mr. COBB). Was there a bunch of them, or just one or two; give the jury some idea how many there were, as near as you can the way it struck you?

A. There are people; one that is shot, and the captain of Santa Rita—I can't get the name right.

Q. Santa Rita?

A. And Itow was sitting on the porch at that time and several others I don't remember; and Mr. Nelson told them he was going to stop them, and so lot of them there I can't remember.

Q. How long did you stay at Mr. Nelson's house this time?

265 A. I was there quite a while at that time.

Q. (By the COURT.) Didn't get that answer.

A. I was there quite a while at that time.

Q. (By Mr. COBB.) Well, when you left there where did you go to.

A. I went home. He says home. You know I have to say just as he says.

The COURT. That is right.

Q. (By Mr. COBB.) You mean by home the Japanese bunk house?

A. Yes.

Q. Then what did you do?

A. Went to bed.

Mr. COBB. That is all. You may cross-examine.

Cross-examination:

Q. (By Mr. RUSTGARD.) Did you go over and look at Frank's body after Frank was killed?

A. No.

Q. When did you first find out that Frank was killed?

A. Just before I went to bed that night.

Q. You found that out after you came from Nelson's house the last time; is that correct?

A. Yes; they was saying, that is all; I didn't know, of course, whether he was killed or not then.

Q. How is that?

A. I didn't know whether Frank was killed or not, but they was saying, people was saying.

Q. What were people saying in regard to Frank?

Mr. Cobb. I think I shall object to that unless they confine it to what person said it.

The COURT. That may be brought out. Objection over-
266 ruled. It will have to be made into another question. Don't need to be combined all in one question. Follow it up.

Mr. Cobb. Exception.

A. (By the WITNESS). You mean from him, referring to Frank Dunn?

Q. (By Mr. RUSTGARD). Yes; his answer was they were saying something about Frank and I want to get at what that was.

A. Why, I don't know just how they said; what way they said.

Q. Well, you knew at the time you went to Nelson's house that Frank had been hurt, didn't you?

A. At the time he went to Nelson's house?

Q. Yes.

A. I don't remember.

Q. Well, when did you first hear that anything had happened to Frank?

A. I don't remember just when it was.

Q. That wasn't after you came back to the bunk house the last time and went to bed?

A. I can't say; I don't remember.

Q. The occasion didn't impress itself on your mind at all?

A. Yes; it did.

Q. Well, isn't it a matter of fact that you didn't know anything about it until the next morning?

A. I don't know; may be he didn't understand me. You repeat your question. I will ask him.

Q. Isn't it a fact that you didn't know anything about Frank's being killed until the next morning when you woke up?

A. I think that is a fact.

Q. Yes; that is a fact. How many Japanese were stopping in that bunkhouse?

267 A. Eleven.

Q. Eleven. Were you all in the same room?

A. No.

Q. How many rooms were there in the bunk house?

A. Three.

Q. You have got the mess downstairs and sleeping rooms upstairs; is that correct?

A. No dining room there.

Q. There is no dining room?

A. No dining room.

Q. How many were sleeping in the room where you were?

A. Three.

Q. Three. Who were they?

A. Itow and Nakayami.

Q. Itow and Nakayami. What position did Itow hold at the cannery?

A. Foreman.

Q. Foreman. What position did Nakayami hold?

A. Testing cans.

Q. Testing cans?

A. Testing cans.

Q. What position did you hold?

A. Bookkeeper.

Q. You were bookkeeper and interpreter, weren't you?

A. No; sometimes I did.

Q. Now, was Itow in bed that night?

A. Night he says.

Q. That night?

A. What time, he says.

Q. Well, what time would you say he come to bed?

268 A. Yes; he was.

Q. What time did Itow go to bed that night?

A. Half past one or two; I don't remember.

Q. In the morning next day?

A. Yes.

Q. Now, what time did Nakayami go to bed that night?

A. Oh, about the same.

Q. About the same time?

A. About the same.

Q. Now, had Itow been to bed that evening before one or two o'clock in the morning of the next day?

A. I don't know.

Q. Had he been in the room at all that evening before midnight?

A. I don't know.

Q. Had Nakayami been in his room that night before midnight?

A. I don't know.

Q. Well, if he had been there, wouldn't you have known?

A. I was asleep, you know.

Q. Now, Ed. Fushimi don't sleep in the same room with you, does he?

A. No.

Q. Who sleeps in the same room with Ed.?

A. Ed. Fushimi?

Q. Ed. Fushimi.

A. Fushimi sleeps upstairs, and a lot of them in there.

Q. There were a lot of them up there?

A. There were eight all together.

Q. There were eight all together upstairs?

A. Yes.

Q. All Japanese?

A. Yes.

269 Q. How many rooms are there upstirs?

A. One.

Q. There are two rooms downstairs?

A. Yes.

Q. And you slept in the downstairs room?

A. Yes.

Q. Who slept in the other downstairs room besides, in the other room that you didn't sleep in?

A. Chinamen.

Q. What Chinamen?

A. I don't know their names, but work—they work for the cannery in bathroom, he says.

Q. In the bathroom?

A. Soldering machine.

Q. Soldering machine?

A. Bathroom and soldering machine.

Q. Now, who did you say woke you up this night?

A. Nakayami and Fushimi.

Q. Nakayami and Fushimi?

A. Yes.

Q. Now, were there anybody else in the house at the time they came and woke you up?

A. I don't know.

Q. Well, do you know if there was anybody upstairs?

A. How is that?

Q. Do you know if there was anybody upstairs?

A. Yes; I know somebody upstairs; yes.

Q. Well, do you know how many there was upstairs at that time?

A. No; I don't.

Q. Well, do you know whether anybody else was woke upstairs at that time or not?

A. I cannot say exactly; I do not know as to that.

Q. Well, where was the Chinamen at the time?

A. Which Chinaman you refer to?

Q. The solderer, sleeping in the room downstairs adjoining yours?

A. He was asleep.

Q. He was asleep. When did he get up?

A. I don't know.

Q. What became of Fushimi and Nakayami after they woke you up?

A. I don't remember whether they were in the house or they went out of the house; I can't say.

Q. Can't say that. Well, were they in the house at the time you dressed and went down to Nelson's?

A. You mean the bunkhouse, don't you?

Q. Yes.

A. I don't remember; don't know.

Q. Now, when you looked out of the door you looked over to the China house, did you, when you first got up?

A. Yes.

Q. Yes. How many people did you see in front of the China house?

A. I can't say.

Q. Did you see Itow there?

A. No.

Q. If he had been there you would have seen him, wouldn't you?

A. Don't know.

Q. Did you hear any talk near the China house at that time?

A. Yes; they were making a noise there.

Q. What did they talk?

271 A. I don't remember, he says.

Q. What language did they talk in?

A. What?

Q. What language did they speak in?

A. I don't remember.

Q. Well, didn't you pay any attention to it or didn't you care what they were talking about, is that why you don't remember?

A. Well, I took interest in their noise, but I didn't know what language it was.

Q. Have you ever seen that sword before?

A. Yes; I think so.

Q. Now, where did you see it before?

A. I didn't understand you.

Q. Where did you see it?

A. I think it looks like one I saw in the cannery.

Q. Where in the cannery?

A. In my room in the bunk house.

Q. In your room in the bunk house? Well, whose sword was that you saw there?

Mr. COBB. Object to it unless makes the witness his own. This is not proper cross-examination.

The COURT. Well, may be considered his own question for the prosecution—witness for this purpose.

Mr. COBB. We object to the question. The prosecution has closed, calling for rebuttal.

The COURT. Objection overruled.

Mr. COBB. Exception.

Q. (Read by reporter.) Well, whose sword was that you saw there?

272 A. Itow. Itow, he says.

Q. (By Mr. RUSTGARD.) Itow. Where did Itow keep that sword in the room?

A. I don't know.

Q. Well, where did you see it in the room?

A. Where, you say?

Q. Where did you see it in the room?

A. Why, I saw the sword when he was pouring powder on the blade to keep it from rusting.

Q. How long before this evening was that?

A. How long?

Q. How long, prior to the 14th of May—the 14th of July?

A. I don't remember.

Q. You don't remember you saw the sword on the evening of the 14th of July before you went to bed?

A. No.

Q. You don't? Are you sure you didn't see it that evening?

A. Don't know, he says.

Q. Don't know. Don't you remember that you saw Itow wetting and sharpening that sword that same evening?

Mr. COBB. I shall object to his leading his own witness that way. The district attorney has elected to call him as his own witness, and I shall object to his leading him.

The COURT. You may change the form of your question a little to this amount, to state whether or not he did see him wetting and sharpening it.

Mr. RUSTGARD. I will withdraw the question under those circumstances.

Q. When Fushimi and Nakayami came and woke you up, didn't they tell you Frank had been hurt?

273 No; they told me to wake up.

Q. Did they say anything else except "wake up"?

A. No; not that I know of.

Q. Well, didn't they tell you there was a fight?

A. Yes; they did.

Q. Well, did they tell you who had been fighting?

A. No.

Q. Now, you were in my office on the 10th of December, last year, were you not, at the time I questioned Ed. Fushimi about the proceedings at the time Frank Dunn was killed, were you not?

A. I was there in your room.

Q. Yes. You heard at that time the statement made by Ed. Fushimi to me didn't you?

Mr. COBB. We shall object to that as improper cross-examination, and if the district attorney offers a statement made by the defendant it is improper at this time because the Government has closed its case; have to ask that it be reopened, and give the reason why.

The COURT. I can't see the purpose of it sufficiently so I can rule on it intelligently.

Mr. RUSTGARD. Simply the question is whether or not he heard the statement. Answer it yes or no.

The COURT. He may answer it.

Q. (Read by reporter.) You heard at that time the statement made by Ed. Fushimi to me, didn't you?

A. Yes.

Q. (By Mr. RUSTGARD.) At that time you and Ed. Fushimi had been subpoenaed as witnesses by the Government, hadn't you?

A. Yes.

274 You knew at that time that I was trying to find out what the true facts of this case were?

A. I don't know. . . You were asking questions.

Q. Well, didn't you realize at that time I was asking questions for the purpose of finding out what the facts were with reference to the killing of Frank Dunn?

A. Yes.

Q. Yes. Well, you yourself at that time went and got Mr. Okajimi to interpret for you, didn't you?

A. Yes..

Q. And he acted as interpreter for you and Fushimi in my office at that time, didn't he?

A. Yes.

Q. Now, at that time you heard Fushimi make the statement in response to questions of mine that "there was no fight in front of the Chinese bunkhouse until at the time Frank was killed," didn't you, and that immediately thereupon he run over to Nelson's house?

Mr. COBB. We shall object to that as not proper cross-examination. They are offering a statement of one of the defendants and it is not proper at this time, the Government having closed its case without opening on that.

Mr. RUSTGARD. The object of the question is this, your honor. I brought out the fact that he was there under my examination as a witness to tell me all the truth about it, and that he sat there and listened to the statement made by Fushimi, and when I asked him about it afterwards he had no correction to make or change to make in Fushimi's testimony as to what the facts were. Now, there is a clear contradiction between that statement by Fushimi and the
275 present testimony of this witness. I submit it is up to him now to explain why he didn't make a statement then.

The COURT. I will have to limit the testimony to this purpose alone.

Mr. RUSTGARD. Yes, sir.

Mr. COBB. If the court please, there is another objection to that. I never saw any district attorney attempt it before. If you can go into—if the district attorney can call witnesses to his office and use what went on there to contradict them, why we ought to have an equal opportunity to have our people placed to show that the district attorney's statement of it was unfair. I think it is against public policy to allow that sort of thing to be brought out.

The COURT. The objection overruled. If the witness has been questioned by the district attorney's office, wherever it may be, if that has been developed, that is a proper fact to be brought out for the consideration of the jury. If any misunderstanding, this is the place for the jury to see that misunderstanding.

Mr. COBB. Now, the court admits the testimony solely for the purpose of having the witness explain, if there is any explanation, why he didn't correct Fushimi's statement at that time.

The COURT. The district attorney's statement is that this witness adopted the statement of Fushimi there as being his testimony on the hearing in his office.

Mr. COBB. We object to the going in to all the detail. Evidently wants to get some sort of supposed statement before the jury, and I think it is leading and improper to bring it out for the purpose indicated.

The COURT. Since it only goes to the question of whether a fight or not at that time, I think it is well within the rules of law and the discretion of the court. The objection overruled and exception allowed. You may answer the question.

Q. (Read by reporter.) Now, at that time you heard Fushimi make the statement in response to questions of mine that "there was no fight in front of the Chinese bunkhouse until at the time Frank was killed," didn't you, and that immediately thereupon he run over to Nelson's house?

A. No; I don't know, he says.

Q. (By Mr. RUSTGARD.) Well, didn't you hear Fushimi make that statement?

A. I don't remember.

Q. Don't remember that? You took a pretty deep interest, didn't you, in the statement which Fushimi made in my office in your presence at that time?

A. Well, to a certain degree I took interest, but I didn't hear all of what he said, you know; something I forgot, of course.

Q. Well, didn't you hear everything that Fushimi said in my office at that time?

A. I heard; yes.

Q. Well, didn't you hear that part of it?

A. I don't remember, he says.

Q. Well, wasn't practically the entire examination of Fushimi devoted to the question of that fight?

A. I don't know.

Q. You don't know that. Don't you think that if Ed. Fushimi had made such a statement as I have indicated that you would have remembered it at this time?

277 Mr. COBB. The court understands our objection applied to all this, of course?

The COURT. Yes, sir; go ahead.

Q. (Read by reporter.) Don't you think that if Ed. Fushimi had made such a statement as I have indicated that you would have remembered it at this time?

A. Well, something I can remember; other things I can't.

Q. (By Mr. RUSTGARD.) Now, then, if Ed. Fushimi's statement had been different from the way you knew the facts to be, wouldn't that difference have impressed itself upon your mind so you would have remembered it?

A. Well, I don't remember what he said, really.

Q. No; I understand he don't. Now, how many times did you go to Nelson's house this night?

A. Three times.

Q. Three times. Did you walk or did you run each time?

A. Run.

Q. Run. Well, what did you run for?

A. I was excited.

Q. You were excited. Did you run there alone?

A. Yes.

Q. Well, what did you run down there for?

A. To tell Mr. Nelson about it.

Q. At that time you didn't know anybody had been hurt and you didn't know who were fighting?

A. No; I didn't see it, so I didn't know who.

Q. Well, you hadn't heard about it, either?

A. No.

Q. No. Now, then, when you came down to Nelson's house
278 the first time who were there?

A. Night watchman; China boss; maybe cook; I am not sure.

Q. Now, you mean the cook in the white men's bunk house—mess house?

A. Yes.

Q. That is Carl Waldall?

A. Yes; Carl Waldall.

Q. What is the night watchman's name?

A. Carl Waldall. Well, maybe Carl Waldall; I don't know his name.

Q. Is that the man?

A. Yes, sir.

Q. What was the night watchman's name?

A. Don't know.

Q. Was he a white man?

A. Yes.

Q. Is he an old man or young man?

A. Old man.

Q. Old man. Did you see Fushimi down there at that time you came there the first time?

A. First time, he says, no.

Q. Did you see Nelson there the first time you got there?

A. Yes.

Q. Where was Nelson?

A. At the door.

Q. Did you speak to him?

A. No.

Q. Well, why didn't you speak to him; you went there for that purpose?

A. Well, I ask China boss what is the matter, and Nelson was saying to the night watchman get prepared, be prepared;
279 so I didn't ask him anything about it.

Q. Nelson was saying to night watchman, "get prepared"?

A. Yes; there may be some men, and I am not certain.

Q. Now, where did Nelson go from there?

A. I don't know. I went to the bunkhouse myself.

Q. Well, did Nelson follow you up to the bunkhouse?

A. No.

Q. You know if Nelson remained there at his home?

A. I don't know.

Q. Did you see Nelson that night anywhere except at his own house?

A. Why, he didn't answer the question.

Q. All right.

A. Now, I saw Nelson in his house, and here some other people.

Q. Now, then, what did you go home to your bunkhouse for at that time?

A. Well, to wake the other boys up.

Q. Wake the boys up. Well, who were sleeping there?

A. Naking.

Q. Which?

A. No; Naking, the Chinese. In Japanese language it is the Chinamen.

Q. Well, anybody else but the Chinamen asleep?

A. I can not say for sure that who were there, but I heard somebody upstairs in the bunkhouse, and may be there was some close to the stairways.

Q. Did you meet anybody outside the Japanese bunkhouse when you came in?

A. I don't remember.

Q. Don't remember. Did you meet anybody downstairs in the bunkhouse?

280 A. I think I met somebody, but I don't know who they were.

Q. Well, after you woke up the Chinamen what did you do?

A. I wake Chinaman up, but he didn't get up.

Q. Didn't get up. Now, after you woke him, what did you do?

A. Then I went to Mr. Nelson's.

Q. What did you go back to Nelson's for at that time?

A. Well, I want to see what going on there.

Q. Oh, yes. Well, why didn't you stay there and see what was going on in the first place? Why didn't you remain at Nelson's house in the first place and see what was going on?

A. Well, I thought I had to go back to the house—to the bunkhouse—to tell the boys.

Q. Well, you didn't know at that time whether there were any boys upstairs or not?

A. Well, I wasn't sure whether there were or not.

Q. Well, why didn't you go over to where the fight was and see what was going on there?

A. And see?

Q. Why didn't you go over to where the fight and *and* see what was going on there?

A. Well, no particular—no particular reason for it. I went to tell Mr. Nelson and went back to the bunkhouse, and of course I was excited and I didn't know what to do, you know.

Q. Well, at the time you came back to the Japanese bunkhouse and woke up the Chinaman were there anybody in front of the Chinese bunkhouse?

A. I think there were.

Q. Well, who were they?

A. I don't know.

Q. Don't know how many were there?

A. I don't know.

281 Q. What were they doing down there?

They were noisy; I don't—

Q. Did they talk any?

A. No.

Q. No; they didn't talk any. What did they make the noise with?

A. Well, I don't know what they made noise with. It was the noise that I heard as I went to the Nelson house.

Q. Well, I am asking now as to what took place there when you came back from Nelson's house the first time to wake up the Chinaman?

A. Well, they were making a noise.

Q. What did they make the noise with at that time?

A. I heard they were making noise; that is all I heard.

Q. That is all?

A. Yes.

Q. Now, why didn't you go over there and find out what it was all about?

A. I don't know why I didn't go.

Q. You didn't expect anybody would get hurt over there, did you?

A. Well, I was afraid; so I went to Mr. Nelson's house.

Q. Well, you knew Itow was out with his sword that night, didn't you?

A. No.

The COURT. We will be at recess until two o'clock.

(Whereupon court took a recess until two o'clock of the same day, at which time the parties being present as heretofore, and the jury in the box, further proceedings were had, to wit, the further cross-examination of the witness K. Ohta was continued, as follows:)

282 Q. (By Mr. RUSTGARD.) Now, Ohta, at the time you were in my office on the 10th of last December, you were asked to state all you knew about this trouble on the 14th of last July at the cannery, weren't you?

A. Yes.

Q. Did you state it all at that time?

A. Well, I don't know whether I said all.

Q. Did you at that time say anything about going down to Nelson's house at all that night or not?

A. Repeat it.

Q. Did you at that time in my office say anything about going down to Nelson's house that night on the 14th of July?

A. I might.

Q. Well, do you know whether you did or not?

A. I don't remember.

Q. Well, you know, as a matter of fact, you didn't say a word about going to Nelson's house that night?

A. I don't remember if I did or not.

Q. Do you remember at that time in my office in the presence of Mr. H. H. Folsom, Mr. Okajimi, Miss Liebhardt, my stenographer, and myself at that time you stated in substance and effect that you were asleep at the time this trouble was going on?

A. Yes; I was asleep.

Q. And you so stated?

A. Yes; I think I did. I think I did, he says.

Q. Referring to the quarrel told about at that time by Mr. Fushimi, one of the defendants, as taking place in front of the Chinese bunkhouse, didn't I ask you this question and didn't you make
283 the following answer at the time in question: Question.

"Where were you at the time this quarrel took place?"

Answer. "I was in bed sleeping."

A. I might have said that.

Q. You expected trouble between Itow and Frank at that time, didn't you?

A. No.

Q. You knew that Frank was trying to get away, didn't you?

A. Yes; I knew it.

Q. And you knew also that Itow knew he was trying to get away?

A. Yes.

Q. The "Santa Rita" was lying at the wharf at that time, wasn't she—the "Santa Rita," isn't that the name of the boat—a steamboat was lying at the cannery wharf at that time, wasn't she?

A. Repeat the question.

Q. The "Santa Rita" was lying at the cannery wharf at that time, wasn't she?

A. I don't know as to that; but the captain was there.

Q. The captain was there. Do you know the captain's name?

A. I don't know, but I think his name is Jim. We call him Jim.

Q. Jim?

A. Yes.

Q. Do you remember what nationality he is?

A. Why, he said he was an Englishman; one Billie told me he was; one Billie told me he was an Englishman.

Q. And you expected the "Rita" to go away the next morning, didn't you?

A. Beg pardon.

Q. You expected the "Santa Rita" to go away the next morning?

A. Don't know; didn't know.

284 Q. Now, you said something about the Mexicans having been drinking that night. Where did you see them drinking?

A. Daytime.

Q. In the daytime?

A. Beg pardon. In the afternoon—that same afternoon.

Q. Well, where were they drinking?

A. Why, in my house.

Q. In the Japanese house?

A. Yes.

Q. Where did they get the whiskey?

A. We had some whiskey?

Q. What kind of whiskey?

A. It is common whiskey.

Q. Did they pay cash for it?

A. No, he says.

Q. You charged it in the books against them, didn't you?

A. No.

Q. No. Well, now—you had a book account with those boys, didn't you?

Q. (By the COURT.) That is meaning the Mexicans?

A. Yes.

Q. (By Mr. RUSTGARD.) Yes; you run a little store there and they bought from you whiskey and tobacco and anything in that line; isn't that right?

A. No; for convenience of the boys.

Q. I understand.

A. And mostly they buy from the cannery store.

Q. Yes. Now, then, you kept a set of books, where you charged up against those boys whatever they bought, didn't you?

A. Yes.

Q. Where are those books?

285 A. I haven't got it.

Q. Where are they?

A. You want to know where the book is?

Q. Yes; the book.

A. I don't keep it myself now.

Q. Well, where are they?

A. I don't know. I don't keep it.

Q. What did you do with them last?

A. Old book was thrown away.

Q. They were all thrown away?

A. All book thrown away.

Q. Did you throw them away?

A. Yes, sir.

Q. Where did you throw them to?

A. In the hotel in Seattle I destroyed it.

Q. Now, you said a little while ago that those boys did not pay cash for the whiskey and you also said you did not charge it on the books. Now, why didn't you charge it on the books?

A. Repeat the question again.

Q. (Read by reporter.) Now, you said a little while ago that those boys did not pay cash for the whiskey and you also said you did not charge it on the books. Now, why didn't you charge it on the books?

A. Well, did I say I didn't put it on the book?

Q. (By Mr. RUSTGARD.) Yes; you did.

A. I didn't mean it. I didn't say it.

Q. That was before the books had been destroyed you made that statement?

A. I don't understand you.

Q. Now, who were those boys that were drinking that night 286 or that afternoon?

A. Gilbert and Frank and Manuel Ara. I don't know—Manuel Ara, maybe; no, that is Gilbert and Frank; Gilbert and Frank. Yes; I remember Gilbert and Frank. I don't remember what others.

Q. Now, what time was Frank over there drinking?

A. Between—sometime between five o'clock and half past six.

Q. How long were they over there?

A. Just a little while.

Q. How much did they drink while they were over there?

A. They had a glass of beer when I saw them.

Q. Well, that is all the drinking you saw, wasn't it?

A. They had a drink about three o'clock also the same afternoon.

Q. The same afternoon they also had a drink at three o'clock. What was that—beer or whiskey?

A. Whiskey.

Q. Now, was that the last drink or the first drink about three o'clock or half past?

A. What I know they drink at three o'clock and then again they drink beer the same afternoon, later on.

Q. Well, how late was that—the last one?

A. Sometime between five and half past six, he says.

Q. Now, how much did they drink the last time?

A. One glass each.

Q. A glass of beer?

A. Yes.

Q. Did you see them drink any more?

A. No.

Q. That is the most you had seen those two drink for a good while, wasn't it?

287 A. This one I saw.

Q. Well, that afternoon they drank more than you ever saw them drink before; is that correct?

A. Beg pardon?

Q. This afternoon you have described did those two boys drink more than you ever saw them drink before?

A. Yes.

Q. Now, the drinks that were bought by Frank, did you put that on the books?

A. No.

Q. Haven't—you charged the drinks up to Gilbert?

A. No; I didn't charge it to anyone.

Q. Didn't charge it to anybody?

A. Didn't charge it to anybody.

Q. How is that?

A. Didn't charge it to anybody.

Q. Now, did you see Itow or Fushimi in the Japanese house this evening at any time?

A. Yes; I saw Itow.

Q. When did you see him?

A. Saw him between five and half past six.

Q. Well, when was the last time you saw Itow before you went to bed?

A. I don't remember.

Q. Did you see Itow at all after you went to bed?

A. Didn't; no.

Q. When was the last time you saw Ed. Fushimi before you went to bed?

A. I don't remember.

Q. Did you see Ed. Fushimi after you went to bed?

288 A. Do you refer to the time after I went to bed at 7 o'clock?

Q. Yes, sir; at seven.

A. I didn't see him until I woke up.

Q. Well, when was that?

A. Eleven o'clock or half past eleven.

Q. Now, Itow was a little drunk that night, wasn't he?

A. He drunk some during the daytime.

Q. Yes. He was a little bit under the influence this evening when you went to bed, wasn't he?

A. Well, he drink; but I don't know how much he drink and how much influence he was under.

Q. Now, did you see Nakayami in the bunkhouse that evening before you went to bed?

A. I don't remember whether I saw him or not.

Q. Did you see him in the bunkhouse at the time you went to bed?

A. I don't know.

Q. Don't know? Now, after you went to bed and before you were woke up by Fushimi and Nakayami did you see Nakayami at all?

A. Yes; I saw him after.

The COURT. He said after. The question was before that. May have been some misunderstanding.

Q. (By Mr. RUSTGARD.) After you went to bed and before you were woke up?

A. No; I didn't.

Q. Now, at the time, in my office, when I was asking you about this matter, didn't Judge Folsom ask you this question with reference

to Nakayami, and didn't you make the following answer: Question.

289 "Was he [meaning Nakayami] in his bunk that night?" Answer. "Well, when I went to sleep he was in his bunk."

A. I don't remember.

Q. You might have so answered, might you not?

A. I don't know.

Q. Don't know. If you so answered at that time was that answer true or false?

A. Well, I don't know whether Nakayami was there or not, to tell you the truth.

Mr. RUSTGARD. That is all.

Redirect examination:

Q. (By Mr. COBB.) At the time you were talking with Mr. Rustgard in his office you were subpoenaed by the Government?

A. Yes, sir.

Q. Were you talking through an interpreter?

A. Yes.

Q. Were you trying to tell him all you knew about the case?

A. What did you say?

Q. Were you trying to tell him all you knew about the case, the best you could, through an interpreter?

A. No.

Q. Does he understand the question? Was he trying to tell him—answer his questions as best he could through an interpreter?

A. Yes.

Q. Now, he has referred to seeing Itow in the Japanese bunkhouse between five and half past six; is that—is he referring to the time that Frank Dunn was in there drinking and Itow came in there?

A. No.

290 Q. That wasn't the time. That is all.

Mr. RUSTGARD. That is all.

363 * * * * *
Mr. RUSTGARD. At this time, your honor, in as much as counsel declined to make an opening statement to let us know what his defense was going to be, I would ask leave to open up the Government's case to introduce some additional evidence. I think it is within the discretion of the court to do so, because I did not anticipate this line of defense. If counsel had made a statement in advance, as I think he ought to, I should have introduced some other evidence to meet this particular line, but I didn't look upon it as relevant at the time. Now, I think to allow the Government to open up the case for the purpose of introducing that additional evidence in addition to the case in chief—I think it is within the discretion of the court, and I submit it is admissible.

The COURT. I think under the peculiar conditions which we have been trying this case I should allow you an opportunity to do that. Of course that opens it up again for the defense.

Mr. COBB. I shall object to this course, your honor, for this reason: With all the powers I had I asked the court, because of justice

and right, that this case be not opened up and begun until I
364 had an opportunity to talk with the witnesses for the defense.
The COURT. That is all right.

Mr. COBB. Counsel forced me to trial without that opportunity. I stated at that time I was unable to make a statement in justice to myself, the jury, or court. Now, counsel had an opportunity to talk with all these witnesses. He had been preparing this case for trial. He hadn't ought to have forced me to trial, and now, when his case isn't developed—I don't think it is justice to the defendants.

The COURT. The court has ruled. You have an exception.

Mr. COBB. Allowing him to open up at this time.

Mr. RUSTGARD. This is the first time I have had to put a witness on after the defense put on witnesses on that stand.

365 (Whereupon the Government reopened its case, and)

KINYA OKAJIMI, being called and duly sworn, testified as a witness on behalf of the Government, to wit:

Direct examination:

Q. (By Mr. RUSTGARD.) Mr. Okajimi, you came up here to Juneau at the request of the defendant Itow to act as his interpreter?

A. Yes; I was asked by a friend of Itow at Seattle.

Q. I see. You speak the Japanese language?

A. Yes; I do.

Q. Have interpreted for a good many years in courts?

A. Yes.

Q. The Japanese to English, and English to Japanese?

A. Yes.

Q. Did you come up to my office on the tenth of last December with Fushimi and Ohta?

A. Yes. Ohta came to my room and said district attorney want me to come interpret, so I came to your office.

Q. Yes. At that time I inquired from Fushimi and as well as from Ohta as to what they knew about this tragedy at Dundas Bay on the 14th day of last July?

A. Yes.

Q. Did you at that time interpret the Japanese into English and the English to the Japanese correctly?

A. Yes; I did to the best of my knowledge and ability.

Q. Yes, sir. Do you remember whether or not there was a stenographer present?

A. Yes; Miss Leibhardt was there dictating what was said.

Q. You mean taking down in shorthand?

A. Yes; sitting just beside me.

366 Q. You remember at that time I asked Fushimi a series of questions?

A. Pardon?

Q. Do you remember at that time I asked Ed. Fushimi, this defendant, a number of questions?

A. Yes.

Q. Which you interpreted?

A. Yes.

Q. Same as in court?

A. Yes.

Q. And the answers of Fushimi to the questions you interpreted in English?

A. Yes.

Q. At that time Ohta and Fushimi were here as witnesses for the Government?

A. Yes, sir; so I understood.

Q. They came from Seattle?

A. Yes, sir; so I understood.

Q. That was prior to the indictment?

A. Yes; yes.

Mr. RUSTGARD. That is all. Take the witness.

Cross-examination:

Q. (By Mr. COBB.) Mr. Okajimi—

Mr. RUSTGARD. By the way, I expect to put Miss Leibhardt on the witness stand; she is in court now. Is there any objection to her being here at the present time?

Mr. COBB. No.

Q. Can you be sure—you say you have had a good deal of experience in acting as interpreter?

A. I have had a lot of experience.

367 Q. You have been official interpreter for the Government?

A. Yes; I was regularly appointed official interpreter at the immigration station at Seattle, Washington.

Q. Been in the diplomatic service of your country, too?

A. No; I was in the United States, though; in fact, sort of official interpreter for their Government before I came to this country.

Q. Mr. Okajimi, are you sure that in interpreting—getting evidence through an interpreter—that it is always as exact and accurate as where it can be taken where all parties understand the same language?

A. Well, sometimes it is pretty hard, especially when you come to translate the oriental language into English; you see, the language is disposed—just suppose where you say “See the moon,” we say “Moon see,” just the other way—so pretty hard you know; and lots of time I have found that Japanese find hard to understand me because I translate it from the English, you see.

Mr. COBB. That is all.

Mr. RUSTGARD. That is all. Miss Leibhardt, will you take the stand?

368 INA S. LIEBHARDT, being called and duly sworn, testified as a witness on behalf of the Government, to wit:

Direct examination:

Q. (By Mr. RUSTGARD). State your full name.

A. Ina S. Leibhardt.

Q. What is your occupation?

A. Clerk to the district attorney.

Q. Were you such clerk during last December?

A. I was.

Q. How long have you held the position?

A. Since April a year ago.

Q. State whether or not you are a stenographer.

A. I am.

Q. State whether or not you were present in my office on the 10th of last December, when Mr. Fushimi, this defendant, made a statement to me in response to my questions through the interpreter, Kinya Okajimi.

A. I was.

Q. Did you correctly make a stenographic report of that investigation?

A. Yes.

Q. Correct report of my questions and the answers and statements through the interpreter?

A. I did.

Q. Have you got that stenographic report?

A. I have.

Q. Have you made a transcript on the typewriter of that report, too?

A. I have.

369 Q. I hand you a typewritten copy here. Look at that and state whether or not that is a transcript of the statement made by the defendant Fushimi in my office at that time.

A. It is.

Q. A correct transcript of the questions asked and the answers he gave through the interpreter?

A. Yes, sir.

Q. That refers to that part of the statement of Ed. Fushimi, the other statement is by Ohta?

A. Ohta.

Mr. RUSTGARD. I offer the statement, the transcript in evidence, your honor, so far as Fushimi's statement is concerned.

Mr. COBB. I want an opportunity to examine it. I suggest—so I may make any objections to it when I examine it—there is a long bunch of it—I would ask that the court—it is only less than half an hour now until adjourning time—I would ask that the court take a recess and give me an opportunity.

The COURT. Any part of the testimony that you can proceed to. I will allow you to take that part.

Mr. COBB. Well, the Government has got the case now.

Mr. RUSTGARD. I have nothing further to produce.

The COURT. That is all, then, Miss Leibhardt, at this time. Any other witnesses for the Government?

Mr. RUSTGARD. That is all, as far as we are concerned.

The COURT. Well, I think you had better proceed, Mr. Cobb; you had better call a witness so we can get along, and I will leave this part of it open.

Mr. COBB. Well, there is one short witness I can call.

* * * * *

373 KINYA OKAJIMI, heretofore duly sworn, being recalled, testified further on behalf of the Government, to wit:

Cross-examination:

Q. (By Mr. COBB.) You say at the time that Fushimi was questioned by Mr. Rustgard you acted as interpreter?

A. Yes, sir.

Q. Was Mr. Fushimi at that time sworn?

A. No.

Q. Was he examined in the presence of other witnesses for the Government?

A. Yes; ourselves; also other white witnesses.

Q. Then who was examined first, the white witnesses or Fushimi?

A. Well, Fushimi first; yes.

Q. Then they heard his statement there?

A. Yes.

Q. And did you and Fushimi hear the statement of these other witnesses?

A. Whom, the white witnesses?

Q. Yes.

A. No, no; we left the room before Mr. Rustgard questioned other witnesses.

Mr. COBB. That is all.

Redirect examination:

Q. (By Mr. RUSTGARD.) Mr. Okajimi, did you hear me examine the other witnesses?

A. No.

374 Q. You don't know whether I examined them before you came in or afterward?

A. No; I don't know anything about it; no.

Mr. RUSTGARD. That is all.

Q. (By the COURT.) Was Ohta in the room when Fushimi was examined?

A. Yes.

The COURT. They were both.

Q. (By Mr. COBB.) They were both examined and then excused and went out?

Answer. Yes.

Mr. COBB. That is all. If the court please, the defendant Itow objects to this on the ground that it is incompetent now to offer it and hearsay, and that if the Government intended to use it as a confession or an admission from the codefendant Fushimi that they should have had separate indictments and separate trials and couldn't go in evidence without possibly prejudicing the jury against the

defendant Itow. Besides it contains voluntary statements made by the district attorney of the same nature that he gave to the press, which are necessarily prejudicial to the case and is not in evidence. We object to it on the part of the defendant Fushimi for the reason that it is a privileged communication; was taken when he was asked to make a statement to the district attorney, and that it can not be used without his consent.

The COURT. The district attorney may state his position.

Mr. RUSTGARD. Well, we submit it as a confession or admission on the part of Fushimi as to certain facts. It is true it isn't evidence against Itow, but they are tried together. They did not ask
375 for a separate trial, and it may be necessary, as it has been necessary to introduce evidence against one that does not necessarily apply to the other, but that is something that can't be avoided where they are both tried together. Now, this statement possibly contains certain matters. I haven't read it over recently, which has nothing to do with the case; that part of it can be omitted in reading as I come to it, and counsel can use a carbon copy and designate what he thinks is immaterial and irrelevant.

The COURT. I think probably we will save time by following the following procedure: Since I haven't read it, I can't pass intelligently on some of the questions raised, and probably while we are taking a recess this evening I will take the matter up with you before I ultimately rule on the subject. You will have the privilege if admitted of reading it at the proper time before the jury.

Mr. RUSTGARD. It wouldn't be admitted at the present time.

The COURT. I can't pass on the matter without reading it and seeing what it does contain. I haven't had an opportunity of reading it. I suggest that plan so we will save time and go ahead.

Mr. COBB. There is this difficulty about it, if the court please, that it places me, as I have so many times been placed in this case, in rather an embarrassing position. I don't know whether the Government—what their evidence is that I have got to meet. I don't know whether that is in evidence or not.

The COURT. Well, if you prefer it, I will take it now.

Mr. COBB. I think it would be better if the court passes on these questions as they come up.

376 The COURT. That is the statement.

Mr. RUSTGARD. Yes; your honor.

The COURT. I don't find any objections on the point you have raised with reference to such matters in general that was published in the newspaper. I thought that might have been contained—

Mr. RUSTGARD. I haven't glanced it over for a while, your honor; I didn't know but that there might be some.

The COURT. Or specific questions and answers, as I read the paper.

Mr. RUSTGARD. Simply a statement made by one of the defendants prior to the trial about this transaction, and, also, we introduced it as evidence only against Fushimi; it might be competent and it is competent, as against Itow, where there has been a conspiracy on

the charge existing under the rule of law that where conspiracy has been shown to exist declarations which one conspirator makes is evidence against all; but I offer it simply as evidence against Fushimi. A general statement by him of the case and his connection with it. Will let you examine a carbon copy, Mr. Cobb, if you will proceed.

Mr. COBB. Just one point here I want to find. There is the part that I referred to.

The COURT. You mean with reference to the witness Nakayama?

Mr. COBB. Obta.

Mr. RUSTGARD. I have no objections to their striking it out to save time.

The COURT. We will omit on page 18 from line 12 on the top of the page to line 3 from the bottom. The objection overruled and it may be admitted in evidence and exception allowed. I marked line 12 from the top and line 3 from the bottom.

Mr. RUSTGARD. I will read it.

United States vs. Itow & Fushimi, Plff's Ex. 4—R. E. R.

"Statement of Eddie Fushimi (through Kinya Okajima, interpreter, December 10, 1912).

"Q. (By U. S. Attorney Rustgard) I understand that you know something about the killing of Frank Don over at Dundas Bay last summer. I want you to tell me now all you know about it and all you saw about it.

"A. They both quarreled and one of them killed.

"Q. Now, what was the quarrel about?

"A. Don't know.

"Q. When did you first hear about the quarrel?

"A. I was there. I was there while they quarreled, but I don't know.

"Q. Where was it that Frank was killed?

"INTERPRETER. I can't understand this fellow. He says bridge or slope—bridge, and then pig pen, or pig house he called it—and between the plank or slope he called it—you know in Japanese he says bridge, you see—and between the pig house there is a hilly place—that is the place.

"Q. Will you look at this picture and see if that represents the place where Frank was killed?

"INTERPRETER. He says this picture doesn't show it very well; he says killing took place just other side of this plank here, and, really, it is sort of continuation of this plank, he says, but this picture does not show it very well, he says.

"Q. Now, do you mean to say that the killing took place to the left of the bridge leading up to the door of the China house, as represented in this picture, and above the double-plank walk along the beach?

"A. Yes; and he says I want to say this, according to the picture these two planks look straight, continuation of this bridge but it is not so, that is just turned this way and this other one sort of continuation of this.

"Q. These double planks to the left of the picture are at an angle, and almost a right angle to the bridge up to the door?

"A. This one—yes; that is what he says, this one—sort of a continuation to this, but this picture don't show this.

"Q. Now where were you at the time Frank was killed?

"A. Near the entrance to the house.

"Q. Well, how far from Frank were you?

"A. Well, he says—he says he can't tell just how many feet, but Frank was killed down below and he was up there.

"Q. Do you mean to say that you were standing at the upper part of the bridge leading up to the door of the China house at the time Frank was killed?

"A. Yes.

"Q. How long had you been standing there at the time Frank was killed?

"A. Just—just a—only a little while; as soon as I saw it I went to the superintendent's house.

"Q. Well, where did you come from at the time you came up there?

"A. Came from Indian town.

"Q. What were you doing up there at that time?

379 "A. He was going to toilet, and then opened door and Frank came out.

"Q. Were you standing near that door of the China house at the time Frank came out?

"A. Yes.

"Q. Did anybody else come out with Frank?

"A. Nobody.

"Q. Did Frank come out alone?

"A. Yes.

"Q. Now, when Frank came out what did he do?

"A. No; he didn't do anything.

"Q. Well, where did Frank go to?

"A. He says he went into the house, and then I heard something, and came out again, he says.

"Q. Now, you went into the house first, then you heard some noise and you went out again; is that correct?

"A. Yes.

"Q. Now, how long had you been in the house when you heard the noise and you went out again?

"A. He says, I can't tell just how long it was, but I went in the house and walked about twenty steps and then entered the toilet and came out, so I don't know how long it was.

"Well, did you see Frank when you went out?

"INTERPRETER. Frank went out of the house, you mean?

"Q. Yes. Did you see Frank when he went out; that is the question. Did you see Frank when Frank went out?

"A. From the house, it is when Frank went out of the house?

"INTERPRETER. He said he does not understand the question. What do you call that house?

"Q. China house?

"A. Well, as soon as he came out the quarreling began.

380 "Q. That is not the question. I want to know whether he saw Frank go out of the China house?

"A. Yes; I saw him.

"Q. Where were you standing at the time Frank came out of the door of the China house?

"A. I was standing near the door.

"Q. Inside the doorway or outside the doorway?

"A. I don't remember.

"Q. After Frank went out, where did he go?

"INTERPRETER. Did Frank?

"Q. Where did Frank go to after he left the door of the China house?

"A. He went to—he went to strike Itow.

"Q. Where was Itow?

"A. He was—I don't quite understand—he say Itow fell down on the ground.

"Q. Itow was down on the ground?

"A. Yes.

"Q. What did Frank do then?

"A. Frank struck him.

"Q. What did he strike him with?

"A. Hand, with his hand.

"Q. Where did he strike Itow?

"A. Didn't see.

"Q. How far from the walk leading up to the China house—this bridge you refer to—was Itow lying when Frank came out and struck him?

"A. Well, close to the end of the bridge.

"Q. Well, was there anybody near them except those two?

"INTERPRETER. He says he doesn't remember; he is just thinking; he hasn't answered at all, you know.

381 "A. Well, it may be Chinaman was there because he was the first one came out of the house, he says.

"Q. Well, was there anybody standing near by Itow and Frank at the time the two were together and at the time Frank struck Itow?

"A. I don't think there was anybody.

"Q. Now, was there any other Japanese near you at the time?

"INTERPRETER. What time do you refer to?

"Q. At the time Frank struck Itow?

"A. No, no.

"Q. Did you see Mr. Ohta there at that time?

"A. No.

"Q. Did you see him in the China house?

"A. No.

"Q. Was he standing near you?

"A. No.

"Q. Now, do you know the reason Frank went out of the China house?

"A. Why, I think he went to strike Itow, I suppose.

"Q. How is that?

"A. He says, went for the purpose to strike Itow, I think.

"Q. Now, after Frank struck Itow, what did Itow do?

"A. Didn't do anything.

"Q. Didn't do anything—did he lay still?

"A. Yes; at the time he was still there.

"Q. Did he get up after he was struck?

"A. Yes.

"Q. After he got up, what did he do?

"INTERPRETER. You refer to Itow when you say 'he'?

"Q. Yes.

382 "A. He got up and he walked toward the China house.

"Q. Itow walked toward the China house—what did he do there?

"INTERPRETER. In the China house, you mean?

"MR. RUSTGARD. Yes.

"A. He was disputing in words with Frank and saying why Frank struck him, etc.

"Q. He and Frank were arguing the case?

"A. Yes.

"Q. Well, what happened then?

"A. Frank struck Itow again.

"Q. What did he strike him with?

"A. He says with his hand.

"Q. Where did he strike Itow?

"A. I don't—I can't tell you.

"Q. Where were you standing at that time?

"A. Near the door.

"Q. You were not standing at the same place?

"A. Well, not exactly same spot, but near the door.

"Q. Well, after Frank struck Itow that time what did Itow do?

"A. He struck Itow; Itow struck Frank with the case of the sword, that is sword in the case, you know—what you call that, I forget that word.

"MR. RUSTGARD. Scabbard.

"A. Scabbard—case, you call scabbard, and they had it in a big, you know, what they call it—clothes bag.

"Q. Outside the sword?

"A. You know, with the clothes on, he struck.

"Q. Where did he strike Frank with that sword in the scabbard?

"A. I can't tell just where he struck.

383 "Q. Do you know where he hit Itow—I mean where did Itow hit Frank with the sword and the scabbard?

"INTERPRETER. I don't quite understand what he means in Japanese, so I am asking him what he means.

"MR. RUSTGARD. Go ahead; just go after him and get the answer to my question.

"A. He says he doesn't know where he struck—

"Q. Well, couldn't you say where Itow hit Frank at that time?

"A. I didn't see where he struck.

"Q. Well, how far away from you was he at that time?

"A. Why, close, I was right close.

"Q. How many feet away were you?

"A. Possibly two feet.

"Q. About two feet away?

"A. Yes.

"Q. What did Frank do then, after Itow struck him with the sword in the scabbard?

"A. He held the scabbard—he held the scabbard with his left hand, I remember he says.

"Q. Yes. Now, then, what did he do with his right hand?

"A. Struck the other fellow?

"Q. Where did he strike him?

"A. I can't tell just where.

"Q. Is this the sword lying here?

"A. Yes.

"Q. Now, what did Frank do then?

"A. Frank, he—hit Itow with his right hand, holding scabbard with his left hand, and Itow struck him too—Itow struck Frank too.

"Q. What did—

384 "A. No; I don't—excuse me, he understood what I said. He did not mean that—oh, he meant, he just mean Frank hit Itow, holding the scabbard with his left hand, that is all he said—I misunderstood him.

"Q. Then Frank took hold of the scabbard with his left hand?

"A. Yes.

"Q. And then Itow did what?

"A. He says he fell down right—Itow fell down right—somewhere near the bridge.

"Q. Did Itow fall down?

"A. Yes.

"Q. After he had struck Frank with his sword; that is what you mean?

"A. Yes—I see, while Frank hit Itow and then Itow fell down.

"Q. Itow fall down?

"A. Yes.

"Q. That is the second time, when Frank hit him—Itow, is it?

"A. Yes.

"Q. Well, then, what did Itow do after he had been knocked down?

"INTERPRETER. You want to know after Itow fell down what Itow did?

"MR. RUSTGARD. Yes, sir. Well, let us have it. Go ahead and tell it.

"A. After a little while he got up.

"Q. What did he do after he got up?

"A. He—when he got up, he says, well—hollered that he hurt Frank.

"Q. Itow said he hurt Frank?

"A. Itow said he hurt Frank.

"Q. Did Frank say anything about having been hurt?

"A. Just a groan.

"Q. Groan?

385 "A. Yes.

"Q. Where did Frank go?

"A. Frank walked staggering toward the road leading to India town.

"Q. How far did he walk?

"A. Six or seven big steps.

"Q. Well, what did he do then?

"A. Frank, you mean?

"Q. Yes.

"A. He fell down and I went to see superintendent; I don't know anything more.

"Q. Well, did you look at Frank when he fell down?

"A. I saw him fall down, but I did not go close to him.

"Q. Did you see how he fell, whether on his face or on his back?

"A. No; I didn't notice it.

"Q. What did Itow do then, after he got up and said he had hurt Frank?

"A. He says, when he started towards the superintendent's house Itow was there in the same place.

"Q. Now, who was the superintendent—what is his name?

"A. I don't know his first name; his name is Mr. Nelson.

"Q. That the gentleman sitting there behind him [indicating]?

"A. Yes.

"Q. Now, did you and Itow go down to Nelson's house together?

"A. That was afterwards, but first I went myself.

"Q. Well, what did you go down to the superintendent's house for?

"A. To tell him about the trouble.

"Q. Now, when you came back from the superintendent's house, did you see Itow up near the Chira house?

386 "A. Now, when I left the superintendent's house, was going back to the place I was before, I met Itow on the way and he hardly could walk, so I helped him to walk to the superintendent's house.

"Q. What was the matter with Itow at that time—why couldn't he walk?

"A. I don't know why.

"Q. Well, had he been hurt?

"A. Well, he was struck, you know.

"Q. O, he was struck—was hurt by Frank so that he could hardly walk; is that it?

"A. Well, I can't tell you about that; as to that, I don't know about it.

"Q. Well, did he complain to you at that time that he had been hurt?

"A. Yes.

"Q. Where did he say that he had been hurt?

"A. He simply said he hurt me bad.

"Q. Didn't Itow tell you where he was hurt—what part of the body he was hurt?

"A. No.

"Q. Did you ask him what part of the body troubled him?

"A. No.

"Q. Where did you take Itow to?

"A. To superintendent's house.

"Q. Well, at the time Itow and Frank had the fight outside did you see Ohta there?

"A. No.

"Q. Now, was there any other Japanese near there except yourself and Itow?

387 "A. Yes; there was Japanese, but I don't know where he came or where he come from.

"Q. Who was the other fellow?

"A. W. Nakayama.

"Q. Now, what was he doing there?

"A. He wasn't doing anything.

"Q. Where was he standing at the time these two men had the fight?

"A. I don't know just where he was standing.

"Q. Where did you see him standing?

INTERPRETER. You mean to say where this man was standing?

"Q. Where did you see Nakayama standing?

"A. Nakayama was on the bridge, he says.

"Q. How far from you?

"A. I don't know just how far, of course.

"Q. Well, can't you state approximately?

"A. Not—just a little way; just only a little way.

"Q. Now, was Nakayama there at the time the fight commenced?

"A. No; he wasn't there when it started.

"Q. How long after the fight started did he come?

"A. Just a little while after that; I don't know just how soon after that; possibly the fight started, he heard it, and he came out, I guess.

"Q. How far were you from Itow at the time he struck Frank with his sword?

"A. About two feet away.

"Q. How far was Nakayama away from Itow at that time?

"A. I can't say where he was at the time—Nakayama you are referring to—Nakayama, you know; I don't remember.

"Q. Can't you say how far away from you he was at that time?

"INTERPRETER. You refer to Nakayama?

388 "MR. RUSTGARD. Yes.

"A. I should judge—I should judge six or seven feet.

"Q. Now, where was he standing at that time when he was as much as six or seven feet away from you?

"A. On the bridge; standing on the bridge.

"Q. Were you standing on the bridge, too?

"A. No; I was close to the door.

"Q. Well, where was Frank and Itow at the time Itow struck Frank with the sword the last time?

"INTERPRETER. Itow struck Frank with the sword, you mean?

"MR. RUSTGARD. Yes.

"A. Frank was right close to me near the door, and then Itow first fell down, you know; he came up to near the house, near to the entrance to the house.

"Q. Well, after Itow was knocked down did he go back up to the house where Frank was?

"A. Yes.

"Q. Well, were they standing on the bridge in front of the doorway at the time they had the last fight?

"INTERPRETER. You mean two, the boys?

"Q. Itow and Frank standing on the bridge leading up to the doorway in the China house the time they had the last fight?

"A. Yes.

"Q. How far from the door?

"A. They were right close to the door, and possibly in the fight may be inside the door.

"Q. I see; right in the doorway?

"A. Yes.

389 "Q. After Itow had struck Frank that last time Frank walked out of the doorway and walked towards Indian town, is that correct?

"INTERPRETER. I don't understand.

"Q. After Itow had struck Frank the last time did Frank walk from the doorway of the China house toward Indian town?

"INTERPRETER. From the doorway, you say?

"MR. RUSTGARD. Yes.

"A. No. They fell down first and then walked toward the Indian town.

"Q. Frank fell down first, after Itow had hit him, and then he got up and walked: is that correct?

"A. Yes.

"Q. How far away from the bridge leading up to the China house was Frank at the time he fell down after he was stabbed?

"INTERPRETER. How far from the—

"Q. How far from the bridge leading up to the doorway of the China house was Frank when he fell down after he was stabbed?

"INTERPRETER. How far away from the bridge, you want to know—the last time you refer to, you want to know?

"Q. Yes.

"A. Seven or eight big steps.

"Q. Now, I understood you to say that when Frank struck Itow the first time Itow was lying on the ground near the bridge leading to the China house; is that correct?

"INTERPRETER. When Frank struck Itow the first time?

"Q. First time.

"A. Yes.

"Q. Then Frank came back to the China house, did he?

"A. Yes.

390 "Q. And Itow followed him up to the doorway?

"A. Yes.

"Q. And then Frank knocked Itow down near the doorway?

"A. Yes—no; he did not knock him down but struck Itow.

"Q. Struck Itow?

"A. Yes.

"Q. And Itow fell down?

"A. No.

"Q. Did Frank ever knock Itow down that time?

"A. No.

"Q. Now, where did Frank strike Itow that last time?

"A. I don't know just where.

"Q. Now, was Frank standing in the doorway of the China house at the time Itow stabbed him, stabbed Frank?

"A. He, he wasn't.

"Q. Well, how far from the doorway was Frank standing at the time?

"INTERPRETER. You refer to stabbing?

"MR. RUSTGARD. Yes.

"A. Near the—can't tell just where, but anyhow near the lower end of the bridge referred to.

"Q. Was Itow standing up or lying down at the time he stabbed Frank?

"A. Well, he was sitting on the ground on—squatting, he means.

"Q. Itow was sitting on the ground?

"A. Sitting on the ground; yes.

"Q. And where was Frank standing—standing up or lying down?

"A. He was lying down.

"Q. Frank was lying down?

"A. Yes; he was lying down.

"Q. Well, what was he lying down for?

391 "A. Well, I think Itow fell down and then Frank also fell

down too; first you know Frank was hitting Itow, you know, he says.

"Q. Well, do you know any reason why Frank should fall down at that time?

"A. Possibly he—he might slip over something; that is what he says, slipped over something and fell down.

"Q. Now, was Frank lying on his back or on his stomach at the time?

"A. He was lying down on his stomach.

"Q. Now, how far away were you at that time?

"A. I was upper end of the bridge then.

"Q. You saw Itow stab Frank at that time?

"A. No; I didn't see it.

"Q. How did you find out that he stabbed him?

"A. Why, he—Itow—hollered that he hurt Frank, you see.

"Q. He called out that he hurt Frank?

"A. Yes.

"Q. Did Frank get up again and walk a while?

"A. He just walked seven or eight steps and fell down.

"Q. Didn't Itow say at that time that he had killed Frank?

"A. No; he did not say so.

"Q. What did Itow do with the sword he had?

"A. When I saw him he had it in his hand.

"Q. What did he do with it at last?

"A. Well, I didn't see what he did with it at last, but I heard afterward he gave it to the superintendent.

"Q. Were you there at the time Itow shot one of the Mexicans?

"A. Well, I was quite a way, I was—going home, he says; I don't know, going home from the superintendent's house, you see; I didn't see.

"Q. How far away were you from Itow at the time he shot?

392 "A. I don't know for sure, but forty or fifty steps, I should say.

"Q. What did he shoot for? Do you know?

"A. No.

"Q. Do you know about any quarrel between Frank and Itow before this?

"A. Not that I know of.

"Q. Haven't heard of any disagreement between them?

"A. —.

"Mr. RUSTGARD. Ask the question.

"A. No; I didn't hear anything about it.

"Q. You are sure of that?

"A. No; I never heard they quarreled or fight.

"Q. Did you hear about any quarrel between the two or any disagreement between them about anything?

"A. They—he says; I don't understand that—he doesn't refer to fight, but he says they had an argument I hear, he says.

"Q. Where was that?

"A. In the Japanese house.

"Q. When was that?

"A. A long time before that thing took place.

"Q. How long?

"A. Oh, week or ten days before that time.

"Q. Now, what was that argument or disagreement about?

"A. I don't know what about; I went in there and saw, that is all.

"Q. Well, now, I want you to tell me what that disagreement was about; you know all about that?

"A. What I heard was that Frank wanted to go away from the camp; that is what I heard.

393 "Q. Now, did Itow expect Frank to go away that night he was killed—that night Frank was killed?

"A. I don't know.

"Q. Had you had any talk with Itow about Frank that evening before the killing?

"INTERPRETER. This man?

"A. No; he did not say anything.

"Q. Had you been looking for Frank that evening?

"A. Yes.

"INTERPRETER. Looking for Frank?

"MR. RUSTGARD. Yes.

"INTERPRETER. Maybe I did not understand that.

"Q. Had you been trying to find Frank?

"INTERPRETER. Oh, I see.

"MR. RUSTGARD. What is the answer?

"A. Yes. That is—he means—

"INTERPRETER. I put it this way, the question—you know you say look for.

"MR. RUSTGARD. Yes.

"INTERPRETER. I said in Japanese, if he hunt for him, that is all right?

"A. He said, 'yes.'

"Q. Where did you go and hunt for him?

"A. Went to the carpenter's place.

"Q. O, yes. What time were you there trying to find him?

"A. I don't know; it was nighttime, but I don't know.

"Q. How long before this fight?

"INTERPRETER. Oh, excuse me; he said afternoon; I misunderstood—not nighttime—I misunderstood him.

"Q. What time in the afternoon?

394 "A. I don't know what time it was, but it was toward evening, he says.

"Q. Toward evening. Now, what did you want to see Frank about at that time?

"A. Frank was a friend of mine, so I just looked for him. I used to drink together with him.

"Q. Did you find Frank at that time?

"A. No.

"Q. Did you ask anybody where Frank could be found?

"A. Cook—and I asked the cook and carpenter, he says.

"Q. Are they here, any of them?

"A. Yes [indicating].

"Q. What did you say to that man?

"A. I don't remember what I said to him.

"Q. Didn't you tell him at that time that you wanted Frank to come and take a drink with you?

"A. No; I didn't say that.

"Q. Was Itow with you at that time?

"A. No.

"Q. Where is Nakayama now?

"A. I don't know where he went from the cannery—he means when the cannery finishes.

"Q. Now, this time that Frank was killed, was Itow with you at the time you went to the Chinese bunkhouse—on the occasion upon which Frank was killed, did Itow go with you at the time you went to the Chinese bunkhouse?

"A. No.

"Q. Where was Itow standing at the time you went in?

"INTERPRETER. To the bunk house, you mean?

"MR. RUSTGARD. Yes.

"INTERPRETER. Chinese bunk—

"A. I don't know.

395 "Q. Did you ask for Frank when you came in that time?

"A. No.

"Q. Was the door locked at the time you came to go in?

"A. Yes.

"Q. How did you get in, then?

"A. Frank opened the door.

"Q. Did you knock on the door?

"A. Yes.

"Q. And Frank opened the door?

"A. Yes.

"Q. Did Frank say anything to you at that time?

"A. He might say something, but I don't remember what he said.

"Q. Did you say anything to Frank at that time?

"A. I don't remember now.

"Q. What did you go in there for at that time?

"A. For the purpose to go to the toilet.

"Q. Is the toilet in the bunk house?

"A. Yes.

"Q. Haven't you got a toilet over to the Japanese bunk house?

"A. No.

"Q. What time of night was this?

"A. About eleven or twelve.

"Q. Was it pretty dark at that time?

"A. It was dark, but not very dark, he says.

"Q. Do you remember whether it was raining or clear weather?

"A. I don't remember; I did not pay any attention to the weather; I don't know.

"Q. (By Ass't U. S. Attorney Folsom). Was there a light in the bunk house; was there any light in the Chinese bunk house at the time?

"A. I don't remember."

Mr. RUSTGARD. Ask that to be marked as an exhibit.

396 The COURT. May be marked "Plaintiff's Exhibit 5."

397 EDDIE FUSHIMI, being called and duly sworn, testified as follows on behalf of the defendants, to wit:

Direct examination:

Q. (By Mr. CORR.) State your name.

A. Eddie Fushimi.

Q. Are you one of the defendants in this case?

A. Yes.

Q. Were you at work in the Dundas Bay cannery last summer?

A. Yes, sir.

Q. What was your business and what were you doing?

A. He says works canning time; he works—I can't understand—put copper, he says.

Q. On the cans?

A. Yes; and in fishing time works bushel machine.

Q. Do you know Itow?

A. Yes.

Q. Do you know Nakayama?

A. Yes, sir.

Q. Tanamachi?

A. Yes.

Q. You were all working out there during the summer?

A. Yes.

Q. Did you know Frank Dunn?

A. Yes.

Q. He was also at work out there this last summer?

A. Yes.

Q. Do you remember the 14th day of last July, the time that Frank Dunn got killed?

A. Yes.

398 Q. Were you working that day during the daytime?

A. I think I worked a little.

Q. About how much did he work?

A. One or two hours.

Q. What time of the day was that?

A. I don't remember. We ate breakfast in the morning; it was, I say, after that.

Q. Now, did you go down that afternoon any time to—towards the dock, looking for Frank?

A. Yes.

Q. Where did you go to?

A. Dock, he says.

Q. Did you make any inquiries of anybody for him?

A. Yes; I asked the carpenter and the cook.

Q. Did you tell the cook that you were going to kill Frank?

A. No.

Q. What did you say to him? Just repeat as near as you can remember what you said to him.

A. I said to the cook simply, "Did you see Frank?" I ask the carpenter, saying, "Did you see Frank?" to the carpenter, and saw him some time ago. He said, "What is the matter?" and I told him, "Itow looking for him."

Q. Was that about all that passed between you?

A. Yes.

Q. Did you go down to the dock in company with anybody?

A. As far as the carpenter's place and the cook's place I was with Itow, but after that I went on alone.

Q. Was Itow with him at the time he went up into the carpenter's room and made this inquiry of the carpenter?

A. Itow didn't come with me to upstairs.

Q. Where did Itow stay?

399 A. I don't know.

Q. When you came back from upstairs after talking with the carpenter where did you go?

A. Then I went to the wharf.

Q. What did you go to the wharf for?

A. There was boat going to leave the wharf and I went to see if Frank was there.

Q. What did you and Itow want to find Frank for? What were you looking for him for?

A. Why, I don't know why Itow want me, but Itow told me to go and find.

Q. Did you see Frank?

A. Yes.

Q. Where was he?

A. He was walking between the warehouses.

Q. Did you say anything to him?

A. I might say "Hello," or something like that; that is all.

Q. Then where did you go to?

A. I was walking little around there at the wharf about ten or fifteen minutes and then back.

Q. Where to?

A. To the bunkhouse—our bunkhouse; to our bunkhouse.

Q. Japanese bunkhouse?

A. Yes.

Q. About what time in the evening was that, as near as you can remember?

A. Repeat the question.

Q. About what time in the evening was that, as near as you can remember?

A. What time you refer to, he says.

Q. The time he went back to the bunkhouse after he saw Frank on the dock.

400 A. I don't remember exactly what time it was—it was—it was toward evening and must be about nine o'clock or half past nine.

Q. Did you find Itow or see Itow about the bunkhouse after you got back there?

A. Itow came back later; later than I did.

Q. Well, then what happened?

A. I told Itow Frank is here.

Q. Did you go anywhere with Itow after that?

A. I think went to the wharf with him, as there was another boat going to leave there.

Q. How long did you stay at the wharf?

A. Oh, I was there just a short while and came back.

Q. Did you go—did Itow go with you to the wharf at the same time?

A. Yes; why he want call to her.

Q. To the wharf?

A. Yes; he went to the wharf.

Q. Then after he came back from there did he and Itow go anywhere else together?

A. No; didn't go with him together.

The COURT. That is, he means he came back from the wharf together?

The INTERPRETER. Your question after he came back from the bunkhouse—you refer to that time?

Q. (By Mr. COBB.) Yes.

A. No, he says.

Q. How late did you stay at the bunk house?

A. I think about until about half past eleven, when Itow, half past ten, I beg pardon, half past ten when Itow came in with an Indian with him to the bunkhouse.

401 Q. Well, now just tell him to go ahead and tell what happened after that.

A. At the time I was talking upstairs. Itow—when Itow came back with an Indian, I notice he was a little drunk; his voice a little bit loud; and upstairs Agasawara and Fugikana, both friends of mine, friends of Itow, *friends of Itow*, said that Itow might be drunk; just watch and take care of him. I was drinking then and those other men were not drinking then.

Q. (By the COURT.) You say he was drinking or not drinking?

A. (By the INTERPRETER.) I was drinking, too; other boys were not drinking—that is, the boys he was talking to.) When I came downstairs, I saw Itow walking with an Indian, putting his arm around the Indian and walk toward the Indian town.

Q. (By Mr. COBB.) Then what did he do?

A. Now, I saw Itow and the Indian walk toward Indian town, and I follow them a little bit, but I lose sight of them. There was some—they had some—there are places to walk to the house, you know. (Interpreter. I didn't quite understand him.) When I saw Itow in the Indian town I saw him with two fishermen.

Q. (By Mr. COBB.) You know who the fishermen were?

A. I don't remember.

Q. Were you with Itow at the time?

A. What is it?

Q. Were you with Itow at the time that he met these two fishermen?

A. No; I met them and he says——

Q. Well, go ahead, now, and tell.

402 A. He said; Itow said go to further to Indian town, and he was going to walk on the steps, he says. He was drunk. I told him you go back and sleep.

Q. Well, go ahead.

A. Now, so Itow and I started back to the Japanese bunk house; sometime Itow walk ahead of me, other times I walk ahead of him; and I went back to bunk house, but Itow stop at the China house.

Q. Go ahead.

A. Now, I went into Japanese bunk house after urinating, and then a little while Itow came back to the bunk house and said, "Frank is there; he might run away; so you better go and lock the door."

Q. What door did he mean?

A. You mean the door of what house?

Q. The door of what house?

A. China house; door of the China house.

Q. Well, then, who did he say that to; who was Itow talking to when he said that?

A. He said to me, and Nakayama happened to be there; and he also said "Nakayama, you better go to."

Q. Then what did they do?

A. We both went to lock the door and found the door was a little bit open.

Q. Go ahead.

A. And then Frank look at us.

Q. Where was Frank?

A. Inside the house; look at us from the inside of the house.

Q. Go ahead.

A. He says, "What you want?" I said, "Itow want us to lock the door." "What for?" he said. I said, "I don't know. It
403 might be somebody trying to run away."

Q. Go ahead. Tell what next happened.

A. And he said, "Who is running away?" he said; and I said, "I don't know who." "Jap don't have to be anything with this house."

Q. Who said that?

A. Frank.

Q. Repeat that; I didn't get it.

A. Well, Frank said, "Japs have nothing to do with this house."

Q. Go ahead.

A. I said, "This is China house, but Itow's boys stays here in the house."

Q. Go ahead. What was the next thing said then by anybody?

A. I said to him, "This key, I think, was given by Chinaman for the purpose to lock the door when it is necessary." I said, "That Chinaman must give the key to Itow to lock the door."

Q. Well, go ahead and tell all about what happened there.

The COURT. We will take a little recess, say until 25 minutes to 4, a recess of 10 minutes.

(After said recess, all parties being present as heretofore, the jury in the box, further proceedings were had, to wit:)

A. (By the INTERPRETER.) He says, "I want to know how far I went."

Q. (By the COURT.) He stopped after he had a talk with Frank about the key.

A. (By the INTERPRETER. You want me to say something more? Shall I translate?)

Q. (By Mr. COBB.) Perhaps I had better start over again. Read the last question and you repeat it to him, and then tell him to go on from that on and tell what happened.

404 A. (By INTERPRETER. You want him to go ahead?)

Q. Yes; go ahead and tell everything that happened.

The COURT. Don't let me go too far, or you will forget it.

A. (By INTERPRETER. Yes; all right.) While we were talking about that Frank said, "This boss of this house is Chinaman," and about that time we were talking little louder; both were a little angry, you know, and then in the meantime I heard somebody coming—this is, it sounded like somebody coming—from the Japanese bunk house, and pretty soon Frank struck me—was going to strike me—and I just turned this way myself [indicating], and I said "Stop," and turning this way [indicating]; but Frank's fist hit me right over here—ear stayed here still—and I fell off toward the Indian village from the incline and I fell off the side. How it happened I don't know, but I hurt my leg awfully bad there. I—my cap was gone, so I picked up finally and stood up facing towards the house.

Q. Which house?

A. China house; and when I fell down on the ground I heard some trouble going on; I heard voice; heard it on the plank.

Q. On the incline?

A. Yes; on the incline; yes. When I stood up facing towards the China house I didn't see Nakayama or anybody there on the plank; Nakayama or any one there on the plank.

Q. By the COURT.) Did or did not?

A. Did not. I stood up and, I think, I turned this way, and saw one man in white shirt at the corner of the China house and seem

he was hollering something, and he was hollering for somebody, he said. I did not see Nakayama then; you know I was down the other side of the incline.

405 Q. (By Mr. COBB.) Go ahead.

A. I am not sure; I think it was just about that time I thought I saw China boss in the house, at the doorway, he says. (Interpreter: He corrected it, in the doorway.)

Q. (By the COURT.) Where was this, at the China house?

A. Yes. At the time Itow wasn't standing up and Frank was lying down this way on [indicating].

Q. (By Mr. RUSTGARD.) Did he say Itow was standing up?

A. Was not standing.

Q. (By Mr. COBB.) Well, now, go back and ask him this question: Did you see Itow when he first came?

A. No.

Q. Where was Itow when you first saw him, at the China house, or anywhere else near there?

A. I can't understand you. Excuse me.

Q. Where was it? Where was Itow when he first saw him; anywhere near the China house there at that time?

A. After I got up from the ground?

Q. Where was Itow then?

A. No. It was a little dark, you know; he wasn't standing up, I know, and he was kind of sitting down; he might be lying down; I don't know.

Q. Was that the first time that he saw him?

A. Yes. I heard his voice.

Q. Well, what, then, did Itow do?

A. Your question, what he do?

Q. Yes; what did Itow do then?

A. He stood up, he says.

Q. Well, where was Frank at that time?

A. Right close to Itow.

Q. Does he—do you know how Frank got there—how he happened to be there close to Itow?

406 A. No; I don't know how, but I know he was there; but I don't know how he came there. Just a moment—maybe—now your question was, wasn't it, how he went there close?

Q. Yes.

A. No; he didn't know.

Q. Now, when you got up off the ground I want you to point out on here as near as you can remember where Itow and Frank were on the ground?

A. Itow was here facing this way and Frank lying here and I was just about here, he says.

Q. Now, go ahead now and tell all that he saw or heard at that time?

A. Itow stood up just a little bit from Frank situate in back of him.

Q. Backwards?

A. Backwards; yes. He said he is hurt.

Q. Who said that?

A. Itow said.

Q. Said who was hurt?

A. He didn't say who then.

Q. Just said "He is hurt"?

A. Yes; "He is hurt." Then Frank groan, says something, and then staggering just fell down a little way from there.

Q. And then what did you do?

A. Well, as I saw Itow come on the incline, he come incline all around not he come incline; I went back to the Japanese bunkhouse.

Q. Then where did you go?

A. I went to the house and told the boys upstairs about the trouble; Ohta was on bed in that place at that time and I push the door
407 open and told him the trouble, and then I went right away, run right away to the superintendent's house and I told superintendent about the trouble.

Q. Go ahead.

A. And when I went to superintendent's house I knocked at the door, and superintendent came out, undressed, with his nightshirt on, and told him what the trouble was, and he went back to dress, and then Mrs. Nelson and one lady—two of them—came down and ask me what is the trouble, and I was talking to the ladies and wait for the superintendent to come. As the superintendent came down he jump off the steps and went, and I was—I thought I would go to the place I was before, and I followed the superintendent; and the ladies, Mrs. Nelson, came out and ask me to tell Mr. Nelson not to go, and she said she is scared. I was going toward that way and I met the cook, then I saw two white men with pistols in their hands. (Interpreter: O, I misunderstood him; can I make the correction?) I met two white men, or he say—he didn't meet them, he says. I saw two white men going toward the—going from the China house towards the white men's bunkhouse and saying "Get gun and kill Japanese. Kill all Japs," says.

Q. Then what did he do?

A. And then the lady, I think Mrs. Nelson's sister, came out and said to me stop Nelson; not to go there; and then I heard a racket and noise, throwing lot of things from the house in that direction. I didn't know which direction, but that direction, and then I heard the shot fired; and I was going toward that direction and then that time superintendent come back towards his house and other people coming, too.

Q. Who were the other people that he saw coming?

A. White men and Japanese, too; I didn't see at the time
408 Mexicans myself. Itow was coming to this; just walking just over this way.

Q. Reeling, you mean?

A. Acting like drunk; just what you call it; I can't express it.

Q. Reeling; staggering?

A. Yes [indicating]; reeling; I don't know staggering is the correct word or not; and I have his arm and told him to go to superintendent's house, and I was help him to superintendent's house. I think Tanamachi came then. Superintendent spoke to Tanamachi; said, "Tanamachi, you understand English, so I would like to talk with him," he said. And then Itow went up to the porch. I am not sure but Tanamachi might have gone up to the porch, too; there is a plank; there is a plank leading to the porch; I was on the plank and then I saw Mexicans coming running. It look as though they were all together; everybody and Itow jump off the porch and then Gilbert and Itow wrestled, and then Japanese boy went and try to separate them, and other Mexican did the same, and just piled one up on the other, and I remember two Mexicans trying to separate them, and then I went down myself and then—the Mexican, the one that was shot, came there with something in his hand.

Q. (By Mr. RUSTGARD.) With some what?

A. With something in his hand, he says. I don't know who it was; somebody on the plank; and have to take the thing from this Mexican's hand when Mexican held his hand like this [indicating], and throw that thing away; threw that thing away; they couldn't separate these two people, you know, and I couldn't do anything, and

I stood on the plank and saw it; that is all; and then Mr. Nelson holler two or three times loudly and then they stop.

Q. Then where did he go to when the row was over?

A. That time Tanamachi told me that Mr. Nelson, superintendent, want us all go back and go to bed, and I went back to the Japanese house, and he said to all the Japanese boys.

Q. Then he went back?

A. Then I went back.

Q. About what time was that he went to bed?

A. I think it was twelve, about twelve o'clock, I am not sure.

Q. He don't know what time it was, then, as a matter of fact?

A. No; I think it was about twelve. I don't know.

Q. Now, he said a while ago that when he was struck at the door—well, I withdraw that question from the record. Will get to that in a minute. When you first went to the China bunkhouse door did you knock on the door?

A. No, sir.

Q. I understand that you didn't knock on it?

A. No.

Q. Did you knock on it at any time that evening?

A. No.

Q. Now, when you were talking with Frank—and you say talking loudly—did you see anyone inside of the China bunkhouse?

A. No, sir.

Q. Now, you had better interpret it to him. You said a while ago that about the time that Frank struck you you heard some one coming from towards the Japanese bunkhouse; is that correct?

A. Well, I heard some one coming when I was talking with Frank, and when I was struck, or when Frank struck me, there were he was quite close.

Q. On the gangplank?

410 A. Say it again.

Q. Was this man he heard coming on the gangplank, does he think, at the time Frank knocked him off of it?

A. You mean the plank, the incline?

Q. Yes; the incline.

A. He was pretty close, but I am not sure about it. I couldn't see it. I didn't see it, you know.

Q. Then, when he got up he saw Itow on the ground near the foot of the plank, was it?

Mr. RUSTGARD. I would like to have it in the second person. You addressed him in the third person; gets it all confused.

Mr. COBB. I think you are correct about it, but it is very difficult.

Q. When you got up off the ground, the first time you saw Itow you say he was lying there on the ground near the foot of the incline?

A. Yes; he was near the end of the plank.

Q. Where was Frank at the time?

A. He was right close together. Itow was here and Frank was this way, right close together.

Q. On top of Frank? I mean Frank on top of Itow?

A. No.

Q. Well, how near? I want him to show to the jury how near each other they were together?

A. Frank did that way; was that way. I was—of course, I didn't see it very well, but it seems Itow was in that position.

Q. Yes.

A. It was, you know, pretty dark, so I couldn't see it well, and I am not sure he wasn't standing up.

411 Q. (By the COURT.) Where was Frank?

A. He was this way [indicating].

Q. (By Mr. COBB.) And that was the time Itow got up and said he had hurt Frank?

A. Yes, yes; he retraced a little backward and then stood up and said that. Oh, he didn't say he hurt Frank. No; you understand is that right?

The COURT. His testimony before was—

Mr. COBB. His testimony was heard Frank groan; thought he heard him groan; ask him about that?

A. But he says this when he heard Itow say hurt; he didn't say he hurt Frank.

Q. Oh, just said he hurt somebody?

A. Yes.

Q. I see. Now, did you push and pull Frank out the door of the China bunkhouse that evening?

A. No.

Q. Were you strong enough to have pulled him and turned him out of that store door if you had tried?

A. I don't think so; he is pretty big.

Q. Did you at any time that evening hold Frank?

A. No.

Q. Did you see anybody else hold him?

A. No; I did not.

Q. Did you have hold of Frank at the time that he was stabbed?

A. No.

Q. Were you summoned over here by the Government last December, about a month ago?

A. Yes.

Q. Were you questioned by the district attorney?

A. Yes.

412 Q. In his room?

A. Yes.

Q. Who was in there when he called you in to question you?

A. There were about six white men and Ohta and Okajimi and district attorney, and that gentleman, and coming in and going out lots of time; and the lady was there, he says.

Q. Did you, in answer to the district attorney's questions, tell him all the truth about this transaction out there?

A. I did not tell him the facts.

Q. Why? Give your reason for it.

A. I noticed the white witnesses talking together to hurt Japanese, so I won't to tell truth about it before them.

Q. Well, now explain why it was that you didn't want to tell all the facts connected with it before the Government witnesses that you thought were working against the Japanese?

A. Repeat the question.

Q. Well, now explain why it was that you didn't want to tell all the facts connected with it before the Government witnesses that you thought were working against the Japanese?

A. I was afraid those people will fix up story and tell anything, and so I would say to state the fact before the grand jury and the court.

Q. Were you called before the grand jury?

A. No.

Q. Were you—at the time the district attorney questioned you, were you sworn?

A. No.

Q. Have you told all the facts connected with this to the best you can remember down this evening?

A. What I have said now is all true.

413 Q. One other question I forgot to ask. I don't remember whether it was this witness or some other. When you were talking with Frank at the door and talking loud, you say, do you know whether or not he was drunk or under the influence of whiskey?

A. Yes; he was. He was drunk—pretty bad, not very bad.

Q. Not very bad?

A. He said.

Q. But you say he was drunk some?

A. Yes; I notice he was drunk.

Mr. COBB. You may cross-examine.

Cross-examination:

Q. (By Mr. RUSTGARD.) You are sure you are telling the truth now?

A. Yes.

Q. Do you think that it would hurt Itow if you told the truth to me first when you came up here?

A. Well—he answered—please repeat the question so I can put the answer correctly.

Q. Did you think that it would hurt Itow if you told the truth to me first when you came up here?

A. Yes; I was afraid if I told the truth that Itow—they will hurt Itow, because the other people are hearing what I say.

Q. Now, if you had told in the first place that Itow was drunk on the night of the 14th of July, do you think that it would have hurt him?

A. Repeat the question.

Q. Now, if you had told in the first place that Itow was drunk on the night of the 14th of July, do you think that it
414 would have hurt him?

A. Why, I don't think you question me about Itow's drink at all.

Q. Didn't I ask you to tell everything you knew about the killing of Frank?

A. (INTERPRETER. Maybe he don't understand.) Yes; you did.

Q. You didn't tell me anything about Frank's striking you, did you?

A. I did not say so. I didn't want to say about it.

Q. You thought that it would weaken your and Itow's case if you told me about that, did you?

Mr. COBB. I object to the form of that question. It is assuming a case against him. This man was not indicted until after they found could not use him as a witness. The form of the question is objectionable.

The COURT. Well, might use suspicion or some other word. I don't know that it might imply about the same to this witness.

Mr. RUSTGARD. Well, I can ask another question or two before. I will withdraw this one.

Q. You didn't expect to be indicted yourself at the time you were in my office, did you?

A. No; I did not.

Q. You knew that you were brought up by the Government to testify against Itow?

A. Yes; he told it.

Q. And so you made up your mind that you would do your best to keep me from finding out about the truth about Itow?

A. Yes; I determined to say before grand jury.

Q. Well, now, do you think at that time that it would have hurt Itow's case if you had told that Frank struck you on the night in question?

A. Well, about that, of course, I thought I would be suspicioned myself.

Q. Yes. You had a slight suspicion at that time, did you?

A. I was there, you know, so I thought I might be suspicioned.

Q. Well, you didn't say anything to me about Frank's striking Nakayama, either, that night, did you?

A. I did not.

Q. No. Did you think it would hurt Itow if you told me at that time Frank struck Nakayama?

A. Well, I thought Nakayama might be suspicioned, too, so I didn't want to say it.

Q. So you were trying to shield Nakayama at that time, were you?

A. Yes.

Q. But now when you say that Frank struck Nakayama you think that puts Nakayama beyond suspicion, do you?

A. Well, I am telling the truth, because I can't tell lie now.

Q. No; don't you think so? Now, don't you think that if you had told me in my office at the time in question that Frank had struck you and Nakayama without cause, as you have explained, that would have helped to take away suspicion both from you and Nakayama?

A. Well, of course, I didn't know. I thought if said struck I thought you think I fought with him, so I didn't want to say. I don't know anything about law, he says.

Q. Now, you remember what you gave me as your reason for going to the Chinese bunk house on the occasion in question?

A. Yes.

Q. Well, what reason did you give me at that time?

A. I said I went to the water-closet there.

Q. You also said at the time that you went there for the purpose of going to the water-closet, and that you went in after Frank opened the door and went to the water-closet and came back again, didn't you?

A. Well, yes; I said so, and I did not want to say that I was trouble with him, you see.

Q. No; but wasn't that just as good a story as the one you are telling now?

A. (INTERPRETER. He don't understand me. He wants it explained. He don't understand me.) Well, I don't know; I don't know the law, so I don't know.

Q. You have been informed as to the law since that time, have you?

A. No; not about the law; no.

Q. Now, you didn't say anything to me about having been sent over to the Chinese bunk house to lock the door, did you?

A. I did not.

Q. At that time you told me, didn't you, that you knocked on the door; that you found the door locked, and that you knocked on it?

A. Yes; I told you lie.

Q. And you also told me at that time that Frank opened the door for you, didn't you?

A. Yes; I said.

Q. What did you expect to gain by telling me the story that you knocked on the door?

A. Well, I thought if I said so, saying that I was up in the house from the house all the trouble then I won't be suspicious at all, and so that way I thought.

Q. Well, why don't you stick to that story now; that is a better story?

The COURT. Don't be argumentative with the witness.

417 Q. (By Mr. RUSTGARD.) Well, I will ask you this question:

If you told that story because you thought it would protect you, why don't you tell it now?

A. I can't say lie, you know, to the court and jury; the grand jury, he says, you know, and——

Q. Now, you told me at that time that Frank opened the door for you, too, didn't you?

A. Yes.

Q. Well, what did you expect to gain by that?

A. Well, nothing, you know; just somebody got to open the door, so that is all I say.

Q. Now, at that time you said that you were standing at the top or the upper end of the incline when Frank struck Itow, didn't you?

A. Repeat the question.

Q. Now, at that time you said that you were standing at the top or the upper end of the incline when Frank struck Itow, didn't you?

A. Yes; I said so.

Q. Yes. What did you expect to gain by that?

A. Now, I didn't think to gain anything, but I said just—I said something different from the fact.

Q. Yes. Did you tell anything true at all that time?

A. Well, some things were true, of course.

Q. They were?

A. Yes.

Q. Now, you explained to the jury that after Frank was stabbed he got up and walked for a ways. How far did he walk?

A. After he was stabbed?

Q. Yes.

A. About from here to the foot of that table; may be nearer; 418 may be shorter, I should say.

Q. Now, when Frank fell at that time, how did he fall?

A. I don't know how he fell. It was dark; near the ground, you know, so I couldn't see well.

Q. Where were you standing at the time Frank fell?

A. Standing on the ground just about here [indicating]; on the ground, just about here.

Q. Did Itow get up at the same time Frank got up?

A. No; Itow got up first.

Q. And when Itow got up where did he go to?

A. And he retreated a little backward, and he got up and went up to the incline.

Q. Now, and you started at that time for the Japanese bunkhouse?

A. Well, after this Itow got to the incline I went to the Japanese bunkhouse.

Q. Did you go underneath the incline leading up to the Chinese bunkhouse at that time?

A. No; I went around the incline.

Q. Did you meet Nakayama there?

A. What is it?

Q. Did you meet Nakayama there?

A. No; I don't think; I don't remember.

Q. Now, what was the next you saw of Nakayama after you were knocked off the steps?

A. Well, in front of the superintendent's house.

Q. You met him in front of the superintendent's house?

A. Yes.

Q. Well, what was the last you saw of Nakayama down by
419 the Chinese bunkhouse?

A. As I was fall—when I fell down from the plank I saw him.

Q. Now, did you run to the Japanese bunk house?

A. Yes.

Q. And from there you run to the superintendent's house?

A. Why, I went into the Japanese house, you know.

Q. Well, you run? You didn't walk?

A. What?

Q. You didn't walk; you run?

A. I don't think I ran inside the house; I don't think.

Q. But up to the house?

A. Well, yes; I ran, but not very fast, you know.

Q. Not very fast?

A. The walking is so bad.

Q. Now, how long were you on the ground before you got up after you had been knocked down?

A. Oh, I don't think quite a while, a minute; I don't know.

Q. One minute. Did you have any trouble in getting up?

A. Yes; hurt me awfully bad.

Q. Yes; that is why you run so fast.

The COURT. I wish the attorneys would always refrain from making any remarks of that sort.

Q. (By Mr. RUSTGARD.) Where were you hurt?

A. Leg.

Q. Had you been in the Japanese bunk house much of the time this evening?

A. What time do you refer to, he says.

Q. After you had your supper?

A. I think I was inside of the bunk house more than I was outside.

420 Q. What room in the bunk house did you occupy when you were there?

A. Well, you want to know his room, which room he occupies as his room?

Q. What room in the bunk house—were you in the bunk house that evening when you were in the bunk house?

A. I was upstairs and downstairs both.

Q. Who else were downstairs with you?

A. That same evening, you mean?

Q. Sure.

A. About what time you refer to?

Q. At the various times you were there after supper.

A. Well, I was some time I was with Itow and other time I was with Nakayama and other time I was with Ohta. I can't tell you just who.

Q. How much of the time were you and Ohta together that night?

A. I don't know. I think Ohta went to bed early that evening.

Q. Now, what were you staying up so late for?

A. Well, partly because Itow—I see Itow was drunk and then I don't go to bed early on Sunday any way; Sunday and other days as well, he says.

Q. Well, how much of the time did Itow used to be drunk?

A. What?

Q. How much of the time did Itow use to be drunk?

A. How much time?

Q. How much of the time?

A. You mean every day, all the time?

Q. During the season?

A. How?

Q. During the season?

A. Not very much.

425 Q. This was the only time, wasn't it?

A. Well, he was drunk before that time one time; once before that, he says.

Q. Once. How long before this?

A. Long time before that; long before that time.

Q. Well, now, how many months?

A. I can't say.

Q. Itow is not a drinking man, is he, as a rule?

A. Yes; he drinks a little lots of time.

Q. Now, when he is drunk does he get out his big sword?

A. No.

Q. How did Itow carry his sword this evening in question? Did he carry it in a sack?

A. Now, this sword was in the bag, you know, but I don't know how he carry it that night; I don't know.

Q. It belongs in a bag?

A. And this sword, the scabbard and it was in the sack, you know.

Q. Sack?

A. But I don't know how he carry that sword that night.

Q. Well, where did he keep the sword?

A. I don't know.

Q. Don't know. Had you often seen the sword out in the bunk-house?

A. What is it?

Q. Had you often seen that sword out—

A. No.

Q. Have you ever seen it?

A. Well, I saw it when we came from Seattle.

Q. Oh, yes; what time was it that you called on the cook asking about Frank?

422 A. I don't remember.

Q. Do you remember whether it was before or after supper?

A. It is after our supper.

Q. What time did you have your supper?

A. Four o'clock.

Q. Four o'clock. Well, how long after your supper was it?

A. Well, maybe three or four hours after it.

Q. About four hours afterwards?

A. Three or four hours afterwards; I am not sure.

Q. Do you know whether the white men had had their supper at the time?

A. When?

Q. At the time you called on the cook.

A. Well, nobody was in the dining room; I didn't see nobody was in the dining room except the cook.

Q. Did you at the same time call on the carpenter, who lived upstairs?

A. Yes.

Q. Itow was with you on that trip, wasn't he?

A. Yes.

Q. You told about going up to Indian town and watching Itow up there, where you saw two fishermen, do you remember?

A. Repeat the question.

Q. You told about going up to Indian town and watching Itow up there, where you saw two fishermen, do you remember?

A. I don't think I did that. I said that—you mean he said this is that it?

Q. Didn't you testify so here a little while ago that you went up to Indian town watching Itow?

A. This afternoon?

423 Q. Yes. You told about going up to Indian town and
watching Itow up there, where you saw two fishermen; do you
remember? I will ask it in a different form. I will get at it
in a different way. Were you up in Indian town shortly before
Frank was killed?

A. No; he didn't go there.

Q. Did you see Itow go up there?

A. After, did I understand?

Q. Before Frank was killed.

A. Before or after?

Q. Before Frank was killed.

A. I misunderstood you then. Yes; he did. He says, "I did."

Q. Now, how long was that before Frank was killed?

A. About ten minutes.

Q. Ten minutes. How far up Indian town did you go that time?

A. Just a little way. It is only a small place, small town.

Q. How far from the end of the Chinese bunkhouse did you go at
the time?

A. How far?

Q. How far from the end of the Chinese bunkhouse?

A. You say, he want to say something more to your first question.

Q. Go ahead.

A. He say, "I would like to know, then, referring to the time from
what time to what time you refer to; how long; I can't understand
it at all."

Q. (By the COURT.) What does he say?

A. (INTERPRETER.) He said he want to find out from Mr. Rustgard
whether he said how long after; how long before Frank was killed,
and he want to know to what—then, when to what time he refer to?)

424 Q. (By Mr. RUSTGARD.) I will get at it a little more specifi-
cally. Were you together with Itow up there at Indian town?

A. Yes.

Q. You and he were walking together?

A. No; I didn't go with him.

Q. How far away from him were you?

A. What?

Q. How far away from Itow were you when you were up at Indian
town?

A. He said he didn't go up to Indian town with Itow.

Q. Well, were you and Itow in Indian town at the same time?

A. Yes.

Q. How far were you away from Itow at the time the two of you
were there?

A. Well, I met him and we were close together.

Q. Now, were you close together at the time you met the two
fishermen?

A. Itow and two other men, three, were there, and I went to see.

Q. Well, now then, you were close to Itow at the time Itow met these two fishermen, weren't you?

A. He says, Mr. Rustgard, that Itow and two other fishermen were there when he went to Indian town; that is what he says.

Q. Was Itow talking to the two fishermen at the time you came up to them?

A. Why, he was saying something; I don't know what.

Q. Well, did he stop and talk to those two fishermen for any length of time?

A. Did he?

Q. Itow?

425 A. Just a little while.

Q. Well, how far away were you from Itow at the time Itow talked to those two fishermen?

A. Just a little ways.

Q. Well, now, how far would that be?

A. Well, just about from here to where you are [indicating].

Q. Were you alone at that time?

A. Yes; alone.

Q. Now, then, from that point did you and Itow go back to the Japanese house?

A. No.

Q. Where did you go to from there?

A. Itow was going further and I told him go home; go back then.

Q. Did you say—you told Itow to go back where?

A. Go home, he says.

Q. What did Itow say?

A. I don't know what he said; no, I don't remember what he said.

Q. Where did you go to?

A. I came back to the Japanese bunkhouse.

Q. How long after you left Itow there in the Indian town was it that Frank was killed.

A. Well, Itow—he said he did not leave Itow there at all.

Q. Well, what did he do if you didn't leave him there?

A. Oh, yes; I went back with Itow to the Japanese bunkhouse.

Q. Oh, you took Itow back with you to the Japanese bunkhouse?

A. Itow didn't go back to the Japanese bunkhouse though, he says.

Q. Well, after Itow had talked to those two fishermen, where did Itow go to?

A. I came as far as the China house with him.

426 Q. With Itow?

A. Yes.

Q. Where did Itow go from there?

A. I think he went to the China house.

Q. He went into the China house?

A. Well, I don't know as to that.

Q. Well, did he go with you as far as to the doorway of the China bunkhouse?

A. No; I did not.

Q. Well, then, what part did he go with you to?

A. This is Indian town this way and here is Japanese house. I left Itow right over here. Itow went to the China house. I went into the Japanese house.

Q. How long after that was it that Frank was killed?

A. About six or seven minutes; I am not sure. About six or seven minutes; I can't say for sure.

Q. Well, that is close enough. Did you see Itow coming back from the Chinese bunkhouse?

A. You mean from the time I left him there?

Q. Yes.

A. Yes, he did.

Q. He came back to the Japanese bunkhouse, did he?

A. Yes.

Q. How long after you parted with him in front of the China house did he come back to the Japanese bunkhouse?

A. One or two minutes; I am not sure. I can't say, he says.

Q. Well, now, at that time he told you to go and lock the door of the China house, did he?

A. What is it?

Q. At the time when he came back he told you to go and lock
427 the door of the China house?

A. Yes.

Q. Where did he get the key?

A. Itow gave it to me.

Q. Where did Itow get it?

A. I think Chinaman gave it to him. I don't know, he says.

Q. Well, where did he get it this evening? Did he get it out of his pocket?

A. It was hanging on the wall of the Japanese house.

Q. Have you ever seen that key used to lock that door with before?

A. No; I didn't know.

Q. I asked you in my office at the time you were there whether or not you ever had any trouble with Frank, didn't I?

A. I think you did.

Q. Yes. You told me at that time you never had any trouble with him?

A. Yes; I said.

The COURT. If we can't finish I guess we might as well close at this time.

Mr. RUSTGARD. Well, does the court, your honor, expect to have court this evening?

The COURT. Well, that depends.

Mr. RUSTGARD. If can't close to-night—

Mr. COBB. I don't think it is possible to close the case to-night. I know it isn't. Will run into Sunday morning. The court has been

holding night sessions, of course, and the court knows a case like this is quite a strain on counsel. I think it might go over until Monday morning.

The COURT. Have you any witnesses to call on the part of 428 the Government in rebuttal? Will there be rebuttal testimony?

Mr. RUSTGARD. Yes; the rebuttal evidence won't take over ten minutes, your honor—five or ten minutes.

The COURT. You have other witnesses besides this?

Mr. COBB. Yes; can't possibly finish to-night.

The COURT. No use of trying to do the impossible.

Mr. COBB. If stayed up to twelve o'clock might finish the testimony, but couldn't get the argument.

The COURT. I know the interpreter and all of them are getting tired. It is evident. Now around five o'clock. Therefore I will ask the jury to bear particularly with the court's instructions about the case; be very careful about the newspapers to-night; be very careful about allowing any one to even mention this case in your presence; bear with us just as far as you can. Let's see if we can't have this case tried fairly and impartially, without any possibility of error creeping into it. That would mean a retrial of the case, and somebody else have to go entirely through with what you gentlemen have done. We will stand adjourned so far as this case is concerned until ten o'clock Monday morning.

(January 12, 1913, ten o'clock a. m., court convening pursuant to adjournment, all parties present as heretofore, the jury being in the box, further proceedings were had, to wit:)

EDDIE FUSHIMI, heretofore duly sworn, being recalled, testified further as a witness for the defendants:

Cross-examination (continued):

Q. (By Mr. RUSTGARD.) Is that your signature attached to that document?

429 A. Yes.

Q. Did you swear to that affidavit?

A. I don't know. I can't read it.

Q. You remember when you signed that? Where were you when you signed that?

A. I don't know, he says, I can't read.

Q. Can you read your own name?

A. Yes.

Q. Don't you remember that you signed that in the presence of your attorney, J. H. Cobb, as notary public?

A. Yes; down below.

Q. Down here, down in the marshal's office?

A. Jail.

Q. Jail. Mr. Okajimi interpreted it for you at the time?

A. I think so, he says. I don't remember, though.

Q. You signed that affidavit setting out what your defense was, didn't you, for the purpose of getting the Government to subpoena your witnesses and bring them up from the States up here in your defense?

A. Well, what I was told was to have witnesses in my behalf; so I signed it.

Q. Yes. Well, at that time you had told your attorney what your defense was, hadn't you?

Mr. COBB. Defendants object to that. I assume, Your Honor, that whatever he told his attorney was a privileged communication.

Mr. RUSTGARD. I am asking whether or not he told his attorney what his defense was.

The COURT. I think that would be the better way. Read the affidavit part and let him explain the difference, if any.

430 A. Repeat the question.

Q. (Read by reporter.) Well, at that time you had told your attorney what your defense was, hadn't you?

A. I did not say very much, but I told what I said was not all facts.

Q. (By Mr. RUSTGARD.) No; I know you didn't. Now, didn't you say this to your attorney at the time and didn't you so swear in your affidavit that the facts of the killing of Frank Dunn were as follows: "That the deceased made an unprovoked and deadly assault upon these defendants, knocking both of them down; that after the first assault and while the deceased was fighting with or beating the defendant, E. Fushimi, the defendant, O. Itow, procured a weapon for the purpose of defending himself and E. Fushimi from the deadly assault of the deceased, and when he returned so armed the deceased knocked said Itow down and off of a plank walk about five feet above the ground, and thereupon said deceased either fell or sprang from said platform upon said Itow, who was at said time upon the ground beneath and either sprang or fell upon the point of a sword in the hands of said Itow and was thereupon run through the body and killed"?

A. (By INTERPRETER.) He wants me to read it again.

The COURT. Better read it in sections; that is, give a sentence and let him answer it.

A. (By INTERPRETER.) You want to start here?

Q. (By Mr. RUSTGARD.) Yes; that is, start there and that paragraph down to there.

The COURT. Don't go too far when you get to some convenient point.

431 A. Says this looks like it was mixed up what I said before the district attorney, and other things.

Q. (By Mr. RUSTGARD.) It is mixed up. Let me ask another question.

A. I signed this simply to ask witnesses to come for me.

Q. You signed that just to get the witnesses to come; is that it?

A. That is what I understand.

Q. Well, you weren't very careful to have that true, were you?

A. Why, of course, I can't read, and I know.

Q. Well, that statement there, which was just read to you, that was mixed up with the statement that you made to the district attorney, wasn't it?

A. I feel that way; yes.

Q. Yes; you feel that way. Well, now, in this affidavit you say that there were two fights; that Frank Dunn first made a deadly assault upon you and Itow and knocked both of you down, and that thereafter Itow went home and got his weapons and came back to defend you?

Mr. COBB. I object to that. He doesn't state any of that.

Mr. RUSTGARD. I will offer it in evidence.

Mr. COBB. Offered in evidence. Doesn't state any of that.

The COURT. May be admitted, and let the affidavit be read. (Received and marked "Plff's Ex. 6—R. E. R.") The court can't take up further time questioning about it. It has already been read. More questions to ask him?

Q. (By Mr. RUSTGARD.) Yes. Well, I will read a little more, just in addition to what I have read. "And that on the evening immediately preceding the homicide, which occurred about midnight, deceased had procured a large quantity of liquor and became intoxicated, and was lying in wait for the purpose of attacking defendants at the time the fracas began."

A. (By INTERPRETER.) You want me to translate?

Q. Just read that in evidence. The affidavit was received in evidence?

The COURT. Yes.

Mr. RUSTGARD. That is all.

The COURT. Did I understand you to say that is all?

Mr. RUSTGARD. That is all.

Redirect examination:

Q. (By Mr. COBB.) When you stated that you told your attorney that what you had stated wasn't true, do you refer to what you had told the district attorney or what you told me?

Mr. RUSTGARD. Just a moment. I object to that as leading. Just opening a way for the witness to—

Mr. COBB. I don't think it is leading.

The COURT. Well, you can put it in another way. Ask him what amount was untrue when he answered the district attorney, I think will be fair.

Q. (By Mr. COBB.) When you said that what you had told was not true when you spoke a moment ago, to what did you refer?

A. I meant all what, what I said to district attorney were not all true.

Q. I believe you stated on Saturday that the reason for that was because he had these Mexican witnesses there to hear what you said.

- 433 A. Yes; that was the reason.
Mr. COBB. Now, I believe that is all.
The COURT. Call a witness.
Mr. COBB. Call Itow.

- 434 O. Itow, being called and duly sworn, testified as follows on behalf of the defendants, to wit:

Direct examination:

- Q. (By the COURT.) Does this witness understand English?
Mr. COBB. No; can't understand English. I couldn't talk to him until Fushimi got here; he knows a little pigeon English.
The COURT. Take the stand.
Mr. COBB. Did you read that affidavit in evidence?
Mr. RUSTGARD. I read part of it.
Mr. COBB. You didn't read it all?
Mr. RUSTGARD. No.
Mr. COBB. What part did you read?
Mr. RUSTGARD. I read the part where he sets out what his defense is; the commencement and closing I didn't read. It is informal.
Q. (By Mr. COBB.) State your name.
A. O. Itow.
Q. Were you employed in Alaska last summer?
A. Yes.
Q. Whereabouts?
A. Northwestern Dundas Bay.
Q. At the Dundas Bay cannery?
A. Yes.
Q. In what capacity? What was your business?
A. Foreman.
Q. Foreman of what?
A. Cannery foreman; cannery foreman for Japanese.
Q. Now, I want you to explain to the jury how you came to be foreman. What were your relations with them? Just one moment now, and in that question explain how these men are secured to work in the cannery.
435 A. Employed by the Japanese contractor and employ men for him.
Q. The Japanese contractor, then, makes a contract to supply men, and who does he make that contract with?
A. He contract with Chinese contractor.
Q. Does he know who that is?
A. I don't know the name; I know now he says his Chinese Goon Dip; named Goon Dip.
Q. Goon Dip, of Portland?
A. No; down in Seattle.
Q. Down in Seattle. Then the Japanese contractor, who is that?
A. J. T. Kikutate.
Q. Where does he live?
A. Seattle.

Q. Now, when these men are employed are they placed under your charge to look after them at this particular cannery—Dundas Bay cannery?

A. Yes.

Q. How many Japanese, if you know, did the contract call for last summer—about how many?

A. Twenty-one, including myself.

Q. Did the contractor succeed in getting 21 Japanese?

A. No.

Q. Well, when they couldn't get that many Japanese what was done?

A. Employed Mexicans.

Q. How many Mexicans were employed?

A. Employed ten Mexicans, but one of them ran away at Juneau, so we had nine.

Q. Included in that nine that he mentions as Mexicans, was
436 there a man by the name of Frank Dunn came up with them?

A. Yes.

Q. Now, then, these nine men, did they come up with the Japanese at the time he came up, the Japanese?

A. No.

Q. About when did they come up?

A. I think they arrived the 26th of April, last year.

Q. And you say that they were sent up in place of the Japanese that they couldn't get?

A. Yes.

Q. Now, when any of these men placed in your charge left, run away, didn't show up, did you suffer any pecuniary loss by it? What I mean, did he lose any money by it?

A. Repeat the question, please.

Q. When any of the men placed in his charge run away, was there any pecuniary loss to him; did he lose any money?

A. Yes.

Q. Explain how that was.

A. Well, it will be claimed that they run away because I not very careful.

Q. Well, he doesn't understand the question, I don't think.

The COURT. Probably does in a way, but can ask him if they charged him something.

Q. (By Mr. COBB.) Ask him if any of the men run away if he is charged anything for it.

A. Now, I have to pay back the money advanced to them in Seattle, and also I have to stand for the goods they buy at the cannery.

Q. Now, do you know whether any money had been advanced to these Mexicans that came up?

A. Yes.

437 Q. Including the deceased Frank Dunn?

A. Yes.

Q. Now, was that the reason why you were anxious for Frank Dunn and all these other men to stay at the cannery, one of the reasons?

A. Yes; that was one of the reasons, and on account of the cannery, too.

Q. Well, explain why it was on account of the cannery.

A. Well, wanted to give them satisfaction, you know.

Q. How did it give them satisfaction?

A. Well, it would be a loss to the cannery, because a man will be short, you know.

Q. Now, along about the early part of July and up to the 14th, did you think that any of your men there were looking to run away?

A. Repeat the question.

Q. Along in July did you think that any of your men—did he have reason to think and did he think that any of his men were about to run away?

A. Yes.

Q. Now, when that condition arose or when he thought that, what did you do to try to keep them there?

A. Well, I watch the boat leaving wharf.

Q. Did you do anything else—talk to them, try to persuade them, or use force or anything of that kind?

A. Well, I just talk to them.

Q. Did he ever try to use force to prevent any of them from leaving?

A. No.

Q. Was it so that you could keep them there by force; were the conditions such that you had it in your power to keep
438 anybody by force if you tried?

A. No.

Q. Now, do you remember the 14th day of July last, the day that Frank Dunn lost his life?

A. Yes.

Q. (By Mr. RUSTGARD.) What was that last?

Q. (Read by reporter.) Now, do you remember the 14th day of July last, the day that Frank Dunn lost his life?

A. Yes.

Q. (By Mr. COBB.) Do you remember whether they were working in the cannery that day or not?

A. Who?

Q. Whether there was work going on at the cannery that day or not?

A. I think the work on the—from one o'clock to about half past one—bushel machine and washing fish only.

Q. The rest of the time, then, the men in cannery were idle?

A. Yes.

Q. Now, did you see Frank Dunn that day?

A. Yes.

Q. What time of the day does he recall seeing him?

A. Well, I saw him two or three times you know.

Q. Yes. Now, at that time did you think that Frank Dunn was going to try and leave—run away?

A. Yes.

Q. What made you think that?

A. The cannery—I can't describe—the cannery this way and fish dock, there is a fish dock and a ship dock, and when I go to fish dock he would come around the other dock and if I go there he would go to other, you know; he evade me; so made me suspicious.

Q. Did Frank have a boat of his own there?

A. No.

439 Q. Were you afraid that he might run off on the cannery boat?

A. Yes; I was afraid.

Q. Now, about eight o'clock in that evening, along about that time, did you go out with anyone looking for Frank, to see whether he was still there or had run away or not?

A. Yes.

Q. Now, if you had found him trying to get away what did you intend to do to keep him? How did you intend to try to get him to stay if you could—what your objects were?

A. Please repeat.

Q. I say if you had found him trying to get away or preparing to leave, explain to the jury what you expected to do in order to keep him if you could?

A. I expected to persuade him just to stay at the cannery.

Q. Now, about—at the time you went out with Fushimi looking for him—say about eight o'clock—where did you go to?

A. Fushimi you say?

Q. That time he went out with Fushimi about eight o'clock to see whether Frank was there or not?

The COURT. Be careful to use the personal pronoun.

Q. (By Mr. COBB.) Where did you go to?

A. This man?

Q. Yes.

A. With Fushimi.

Q. Yes. When you went with Fushimi, about eight o'clock, looking for Frank, where did you go to?

A. You mean Fushimi and this man?

Q. Yes.

A. I had Fushimi go to the carpenter's place to look for him.

Q. Now, that is at the white man's bunk house?

A. Yes.

440 Q. Did you go up into the bunkhouse when you got there with Fushimi?

A. No; I was down below.

Q. When Fushimi came back where did you go to?

A. I went to the beach over the hill that—(INTERPRETER. Mr. Cobb, I can't describe; he says when the hill from it over the hill.)

Q. To that point of high land running out?

A. The point; yes.

Q. Did you go to that point alone?

A. Yes.

Q. What did you go there for?

A. I just wanted to see if somebody had boat there and for Frank come, you know.

Q. Thought maybe there might be a boat hidden behind that point; is that it?

A. Yes; I was afraid so.

Q. Now, when you came back from the point where did you go to?

A. I went to the wharf of the cannery.

Q. Did you meet Fushimi there?

A. What you say?

Q. Did you meet Fushimi?

A. No.

Q. Did you see Frank Dunn on the wharf?

A. No.

Q. Then where did you go to?

A. I was going back to my place and I went to the China bunk house where Frank sleep.

Q. What did you do when you got to the China bunk house?

A. I went in there and said—I went there and said "Hello" to the Mexicans, and one Mexican was there, one of those
441 Mexicans called here now as a witness.

Q. Did you inquire where Frank Dunn was?

A. No; I did not.

Q. Did you look to see if he was in there?

A. I went to the bunk where Frank sleeps, you know; laid my hand over there to see if he was there.

Q. Then where did you go to?

A. Went to—went home himself.

Q. (By Mr. RUSTGARD.) Let me ask, then, was Frank in the bunk?

Q. (By Mr. COBB.) The next question I was going to ask. When you put your hand in the bunk and looked in the bunk was Frank there?

A. No; then I ask Mexican referred to, "Where is Gilbert, the foreman?"

Q. "Where is Gilbert, the foreman?"

A. Yes.

Q. Was that about all the conversation that took place there?

A. And the Mexican said in Japanese, Gilbert sleep, and then I went home.

Q. Was that, now, about all the conversation that took place there?

A. Yes.

Q. When you got home—you mean by home the Japanese bunk house?

A. Yes.

Q. When you got there who did you find, if anybody?

A. You mean in the Japanese bunk house?

Q. Yes.

A. I went upstairs in the bunkhouse and I saw Japanese boys, including Fushimi, were there in the bunk.

Q. (By Mr. RUSTGARD.) Including who?

A. Including Fushimi.

442 Q. (By Mr. COBB.) Did you have any talk there with Fushimi regarding Frank Dunn—did he tell you anything regarding Frank Dunn?

A. Well, yes; I talk to him about him and Fushimi says Frank Dunn is near in the cannery. (INTERPRETER. He means to say not working, but just around there, you know; that is what he means.)

Q. Yes. Did Fushimi tell you he had seen him since you and Fushimi had separated?

A. Yes; he said so.

Q. About how long, as near as you can recall, were you at the Japanese bunk house before you left it again?

A. Four or five minutes.

Q. When you left, did you leave in company with anybody?

A. I went out with Fushimi.

Q. Where did you and Fushimi go to?

A. Went to the wharf.

Q. (By Mr. RUSTGARD.) The wharf?

A. The wharf; yes.

Q. (By Mr. COBB.) What did you go to the wharf for?

A. Why, we going to watch the boats leaving there.

Q. How long were you down at the wharf?

A. I don't remember; I am not sure, but I think we must have been there about half an hour.

Q. Then where did you go to?

A. I went back to the bunkhouse with an Indian with me.

Q. Fushimi stay at the wharf?

A. I left Fushimi, and I don't know where he had gone to.

Q. Now, while you were at the wharf on this occasion, did you see Frank Dunn?

A. No.

Q. Where did you and the Indian go to?

443 A. I went to my room in the Japanese bunk house. He isn't with me.

Q. How long did you stay there?

Q. (By the COURT.) What is the question?

Q. (By Mr. COBB.) How long did you stay at your room?

A. Just a little while.

Q. Then where did you go?

A. I went to the Indian town with him.

Q. Do you remember whether Fushimi came back to the Japanese bunk house while you and the Indian were there?

A. You mean, it come back to the Japanese bunk house?

Q. Yes. While he and the Indian were there.

A. I don't know.

Q. Were you drinking on this evening?

A. What?

Q. Were you drinking this evening?

A. Yes; I had drink with Mexican forman, Gilbert; he says, their holiday that day.

Q. And how much had you taken, as near as you can recall?

A. Well, four or five small glasses; four or five whiskey glasses; about of this size, he says [indicating].

Q. Did you drink any beer?

A. Yes; afterwards I drink beer, too.

Q. Now, when you left the Japanese bunk house with the Indian, where did you go to?

A. Indian town.

Q. Did Fushimi go with you?

A. No; he didn't go with him, but I saw him in the Indian town later on.

Q. Did you meet anybody in the Indian town, as you were going to it or coming from it?

444 A. I think when I was going to leave Indian town, I think I saw three or four white men.

Q. Was Wick and Hogan among them?

A. I don't know.

Q. Did you draw your pistol on anybody?

A. No.

Q. Do you know whether any of these men that evening had seen you with a pistol or not?

A. Didn't understand you.

Q. Do you know whether any of these fishermen had seen you with a pistol that evening or not?

A. Yes; when I went back to—when I went back to the Japanese bunkhouse from the wharf there were, I think there was some fishermen there at the Japanese house, and when I had my gun out of my pocket and laid it on the counter and possibly they saw it.

Q. Now, while you were up there in Indian town did you have any talk with Fushimi about anything—did Fushimi speak to him while he was up there at Indian town?

A. Fushimi said to me, "Go home; go back"; and he took—and he took my hand.

Q. Does he know why Fushimi wanted him to go back?

A. I don't know. I think it was getting—I think it was because it was getting late.

Q. Did he go back with Fushimi?

A. Yes; and on our way back I stopped and looked in the China bunkhouse.

Q. And what did Fushimi do when he stopped at the China bunkhouse?

A. He walked on to the Japanese bunkhouse.

Q. Well—

Q. (By Mr. RUSTGARD.) What was that?

445 A. He said he walked toward the Japanese bunk—bunkhouse.

Q. (By the COURT.) Fushimi?

A. Fushimi; yes.

Q. (By Mr. COBB.) Whereabouts at the China bunkhouse did you stop?

A. The entrance to the China bunkhouse; he said door to the China bunkhouse.

Q. What did you stop there for?

A. Well, I want to see if Frank was there in the bunkhouse, and I saw Frank walking toward his bunk, toward his room in mess room. (INTERPRETER. That is, Mr. Cobb, he means to say, you know, he saw Frank in the mess room walking towards his room.)

Q. Walking towards his room?

A. That is what he means.

Q. Did he speak to him?

A. No.

Q. Did you go in the mess room?

A. No.

Q. As I understand you, then, you just stopped a moment and looked in the door and then went on towards the Japanese bunkhouse?

A. Yes.

Q. When you got to the Japanese bunkhouse, who did you see?

A. When—as I entered the Japanese bunkhouse Fushimi, of course, was just there about the same time I went there, and I saw Nakayama—Nakayama in the bunkhouse.

Q. Did you say anything to him?

A. To who?

Q. Did you say anything to Nakayama and Fushimi?

A. Yes; I told them to go and lock door.

446 Q. What door?

A. Door of the China bunk house.

Q. Where was the key to the door?

A. The key was on the—hanging on a nail at the wharf near the counter.

Q. (By the COURT.) At the wharf?

Q. (By Mr. COBB.) The wall?

A. Wall—w-a-l-l.

Q. Did you give them the key?

A. Yes; I gave the key to Fushimi.

Q. Then did they leave—did they leave the Japanese bunk house?

A. Yes; they both went out.

Q. Did you go with them?

A. No; stayed home.

Q. How long did you remain in the Japanese bunk house then?

A. Two or three or four minutes; something like that.

Q. Did you take any particular account of the time, or notice it particularly? Ask him if he noticed how long it was particularly.

A. No, I didn't; did not.

Q. Now, when you—what made him leave the Japanese bunk house—how did—

A. I heard—after they went out I heard the talking loud and I thought they might be fighting, you know, and I went out.

Q. Did you take any arms with you?

A. I took a sword with me. I had a sword in scabbard, and I took it with me.

Q. Did you go to stop the fight—for that purpose?

A. Yes; and to protect my men. He says, "boys, excuse me."

Q. Well, where did you go to?

447 A. Went to the front of the China bunk house.

Q. When you got there, what did you see?

A. INTERPRETER. I want to understand what he means. Soki means slope in Japanese; that is what I asked him.) At the time I was about to step on the incline, as he calls soki—incline, I saw these boys knocked down to the ground.

Q. Now, just describe how they were knocked down and who by. Tell what he saw there as best he can.

A. You repeat your question.

Q. Just tell how these boys were knocked down and who by—just describe it as best he can—that is all.

A. Now, I saw Frank knock them down, and I went up and says, "What is the matter"?

Q. Go ahead and tell all what happened.

A. And Frank, you know, came to me.

Q. Well, now, go ahead and tell all that happened.

A. Frank said, "God damn," and he was going to hit me so I hit him with scabbard of sword, you know; hit him; was going to hit him and he put his hand up this way and then held it and hit me hard over here over this way, this side [indicating], and then I was knocked down, fell on ground. Beg pard, I was knocked down, he says.

Q. Was the sword in the scabbard when Frank caught it?

A. What is it?

Q. Was the sword in the scabbard when Frank caught the scabbard?

A. Yes.

Q. Did he have hold of the handle of the sword—did you have hold of the handle of the sword or the scabbard at that time?

A. I held the hilt of it.

448 Q. With which hand did Frank catch the scabbard of the sword?

A. Left; I think it was his left hand.

Q. Which hand did he strike him with—which hand did he strike you with?

A. This man, you mean?

Q. Yes.

A. Right hand.

Q. Now, you have spoken of Frank knocking down two men before you came or about the time you came. Who were those two men?

A. Fushimi and Nakayama.

Q. Just step here a moment. About where, as near as you can recall, did Fushimi fall when Frank knocked him down?

A. Now, I was, of course, excited, and then it was not very—it was pretty dark, so I couldn't tell just where he fell down.

Q. How near to the door were they when they were knocked off?

A. You refer to Fushimi?

Q. Fushimi; yes.

A. No. You mean——

Q. When Frank knocked them off the sidewalk there, how near to the doorway were they off?

A. You mean how near to the door they fell down on the ground?

Q. Yes.

A. Somewhere around there. I can't just exactly.

Q. He couldn't say exactly?

A. No.

Q. Now, about where was he when Frank——

The COURT. Who do you mean?

Q. (By Mr. Cobb). Where were you when Frank struck you?

449 A. I think somewhere around there; of course, I can't say for sure, you know, just the exact place.

Q. Did he knock you down?

A. Yes.

Q. Where did you fall to, as near as you can recall?

A. I can not say for sure, but I think I was—fell down somewhere around there; I could not say.

Q. And—meaning the lower end of the incline?

A. Yes.

Q. Then, when you fell, what was the next thing you noticed?

A. Now, I felt weight on my sword and heard a man holler.

Q. Was that while he was on the ground?

A. Yes; when I was resting; squatting, he says.

Q. When you were knocked down, did you hold onto the sword?

A. Yes; I did.

Q. Do you know whether the sword was at that time unsacked; was off the scabbard?

A. It was off the sheath.

Q. How did it happen to come off the sheath; how did it happen that the scabbard came off it?

A. I think because Frank held it, you know; so must have got off the.

Q. Pulled off when knocked down. Now you can sit down again. At that time did you intentionally run that sword through Frank?

A. No, sir.

Q. When you got up could you feel the sword being pulled out of the body; just describe what you noticed.

A. Now, as soon as I felt weight on my sword I heard the man holler; I don't mean exactly groan, you know, he says; com-
450 mence groan, but I can't translate it as groan, because he says a proper word, and he got up and at the time he became kind of dizzy, you know, and I didn't know what became of this man.

Q. Well, do you know where you went to when you got up?

A. Of course I can't remember very well, you know; but when I saw things throwing upon me I know I was on the plank, there; on the plank.

Q. Yes. What things were being thrown upon him, as near as he can recall?

A. Well, a lot of things were being thrown upon me. Of course I didn't know what they were, but one thing was thrown close to my ear; I know it was very hard, heavy stuff.

Q. Well, what did you do; anything to protect yourself?

A. Yes; and I held my hand like this, with my sword in my hand like this, to protect myself.

Q. To protect his head, does he mean?

A. Yes.

Q. Now, did you see anybody inside—I withdraw that question for a moment—when you first came up to Frank had you seen anybody inside of the door? Did you see anybody besides him up there near the—inside or near the door of the China bunk house?

A. When I first came?

Q. When you first came up and before Frank hit him did you see anybody inside?

A. I didn't notice anyone; no chance to look around.

Q. When these things began to—began to be thrown at you—where were they coming from?

A. First I didn't know where the things were coming from, but afterwards I noticed they were coming from China bunk house, through the door there, mostly.

451 Q. Did you challenge anybody to come out and fight with you?

A. No, no; I didn't say that.

Q. Now, while you were there on the gangplank—the incline—and these things were coming out at you, did you notice anybody else come? Who was the first person that came there that you remember while he was on the gangplank and these things were being thrown at him?

A. Yes; the man named Gilbert, Mexican foreman; and I remember—

Q. Where was he?

A. Inside of the door, he says.

Q. Did he see anybody else in there; see any other men that he couldn't recognize?

A. I think there was some, but I didn't know who they were.

Q. Now, did anybody, while he was there, come up on that gangplank; anybody come up on the gangplank in the next few minutes, that is it?

A. Tanamachi came between Gilbert and myself.

Q. (By the COURT.) Who did?

A. Tanamachi.

Q. (By Mr. COBB.) Do you remember what Tanamachi said?

A. He said something to me.

Q. Do you remember what it was?

A. I understood him saying in Japanese "Stop."

Q. Do you know what he said to Gilbert?

A. He said something I didn't understand. I don't remember, he says.

Q. Did you say something to Tanamachi; send him anywhere and any place? If so, what for?

A. Ask him to call the superintendent.

Q. Did he leave him then?

452 A. Yes.

Q. Then what was the next thing that happened that you remember?

A. Now, then, after Tanamachi left there, and when the hard, heavy stuff thrown over here, I held up my hand and the gun was fired, shot.

Q. The pistol, he means?

A. The pistol; and then I ran to the superintendent.

Q. Did he hear the superintendent call?

A. No.

Q. Is that the pistol [indicating]?

A. Yes; that is it, he says.

Q. How can he tell that is the particular gun?

A. I know this is mine, because it is out of order. You can't shoot but one shot. You can't fire but one shot.

Q. Something wrong with the works of it?

A. Yes.

Q. (By the COURT.) What did he just say?

A. Something wrong with it, he says; you can't—

Q. (By Mr. COBB.) One of these double-acting; when goes off won't work any more unless you take it apart and push it down. Now, as you ran away from there did you meet the superintendent?

A. Yes.

Q. Whereabouts did you meet him?

A. I can't say just where, but I think it was between the China bunk house and the Japanese bunk house; somewhere there.

Q. When you met him what did you do?

A. I threw my sword and pistol at the foot of Mr.—of the superintendent, Mr. Nelson, who was standing on the sidewalk. I ran to the superintendent's house, walking on the ground.

453 Q. By the side of the walk, does he mean?

A. Yes.

Q. Did you know at that time that Frank had got killed?

A. No.

Q. When did you first find out that Frank had been killed?

A. Next morning, when I went to eat breakfast, they were talking about it, and so I knew.

Q. Do you mean the men at the breakfast table, the employees there were speaking about it?

A. Yes; I think so; yes.

Q. Then what did you do?

A. Then I knew that I have to go to Juneau, and I know the boys they have to work—the boys to go, and then took Tanamachi with me, and went into the superintendent's house.

Q. Why did you take Tanamachi?

A. As my interpreter.

Q. Well, now state what you told the superintendent. What did you go to the superintendent for?

A. I went to ask—to ask for the superintendent to have me go to Juneau and thence to say, "I sorry this thing happened."

Q. What did the superintendent say?

A. Now, I said to the superintendent, through the interpreter, asking him to send me to Juneau, and superintendent said he sent man over to Juneau already, so one boat was engaged on that account and another boat was out getting fish, so impossible for him to send to Juneau; so we had wait until he hear from Juneau.

Q. Say anything about the marshal coming for him?

A. Well, he said wait until then; some one come after me. I understood, I conclude he means marshal.

Q. Yes. Some one come after him?

454 A. Yes.

Q. Then what did you do?

A. Then I went to cannery and began to work.

Q. How long—how many days did you stay there at work before the marshal did come?

A. I work 15th and 16th, and the morning of the 17th they came after me.

Q. He has been here in Juneau ever since, here in jail?

A. Yes.

Q. Now, did he ever take lessons or practice anything with a sword?

A. No; I am a farmer.

Q. What is that?

A. I am a farmer. Farmer in Japan supposed not to know anything about fencing, that is why he says.

Q. Where did you get that sword?

A. What?

Q. Where did you get that sword?

A. About four years ago a friend of mine left this country for Japan and he gave this sword to me as kind of memory.

Q. And you had it ever since up till this last summer?

A. Yes.

Q. Now, do you know the condition of the handle of that sword last July when last in your possession?

A. Yes.

Q. I want you to tell the jury whether there was any other wrappings around it, besides what is around this handle now, at that time?

A. Wrapping?

Q. That is, bamboo things?

455 A. Now, he says there is another wrapping around here same here.

Q. Around the middle?

A. Around the middle and this one was looser; looser, about like this, and this one tied tight around, and then he says here ought to be some middle piece around here attached to this fixing, this you know; that is gone. Ought to be here some middle piece; here up to scabbard. Then won't make crack, you see—a middle piece.

Q. A middle piece sticking out from here?

A. He says it is broken here.

Q. Was that broken at the time he went over to the bunkhouse with it?

A. No; it wasn't. It was there.

Q. About how much do you weigh?

A. About 120 or 125, I should think.

Q. You haven't weighed in quite awhile?

A. No.

Mr. Cobb. You may cross-examine.

Cross-examination:

Q. (By RUSTGARD.) Did I understand you to say that there were several Mexicans who wanted to get away at the same time when Frank wanted to get away?

A. No; I didn't say that.

Q. Well, were you afraid last summer that several of your men would leave you?

A. Well, yes; if one ran away, then some other fellow might run away, too, you know.

Q. You had a good deal of trouble before with people running away from you, did you?

A. No.

456 Q. Have you been foreman of a cannery before this season?

A. No; I was not a foreman, but I work in cannery for several years.

Q. This was your first summer as foreman, was it?

A. Yes.

Q. How many men did you have under you?

A. It ought to be twenty, but one run away here in Juneau, so there was nineteen.

Q. Nineteen; that includes Japanese and Mexicans?

A. Yes.

Q. Now, what reason did you have for believing that Dunn was going away?

A. (INTERPRETER. He ask me what is the dates you mention, so, then, I ask him to repeat and then go over again and make it a little shorter.)

The COURT. Probably better give what he said and get the dates later.

A. (INTERPRETER. He wants to say some more.)

The COURT. Well, repeat what he said first.

A. Now, he says it was about six—about three weeks before I heard that Indian says that time Indian said that Frank wanted to engage a boat, and then Tanamachi one time went to see about it and Indian said the same thing, so I became suspicious about it, and one day I said to Gilbert, Mexican foreman, "Where is Frank?" and Gilbert says he went to look around this morning; and, again, one day I saw Frank was dressed nice, you know; nice shoes on; not working clothes, and so all those things made me suspicious that he was trying to run away.

The COURT. Now, if he has got anything more to say—

A. Now, when he dress nice I told him go and change his
457 dress, you know; go to work, as I told him to go and change his clothes, and he was going away and he said something that I didn't understand it, so I said come and see me that time, and that evening he came and Tanamachi did the interpreting. Now, Frank said that night that he didn't want to work in the cannery and he want to leave there, but I said to him if he goes away that much men will be shorter; that much will be short and quite an inconvenience to the company, and ask him to stay and work. He said that time he said that time he do not like food he eat there, but I said to him that he has been over two months and a half, two months, not two months and a half, about two months and he didn't make any complaint about it until then and I ask him to stay and work.

Q. (By Mr. RUSTGARD.) How long was that before Frank was killed?

A. About one week before.

Q. One week?

A. Yes. Monday—it was on Monday; Monday night.

Q. Well, you were afraid on the night of the 14th of July that Frank would sneak away, wasn't you?

A. Well, I was afraid he might run away.

Q. What did you intend to do with him if you caught him running away?

A. I intended to persuade him to stop.

Q. Well, how, by the use of the sword or otherwise?

A. Why I just persuade him to stop, that is all.

Q. You didn't intend to use any physical force so to make him stop?

A. No.

Q. Now, why didn't you stop and talk to him when you saw him in the Chinese bunkhouse in the evening before he was
458 killed?

A. Well, well I wasn't sure, you know; he was trying to get away then, so I don't talk to him.

Q. Well, why didn't you go in and ask him about it?

A. Why, I couldn't do that very well, you know.

Q. Well, now, you thought at that time that if Frank was trying to get away if you locked the door that would stop him?

A. Well, I thought it would help me some any way.

Q. Yes; well, you thought if he had made up his mind to sneak away on the next boat the next morning that locking the door would keep him from going, is that right?

A. Now, why not exactly; but I had to go to sleep, I couldn't watch him, you know, all night, you know, and I thought that would help me any way.

Q. Well, now, if you thought that persuasion would help why didn't you go in and ask him if he intended to go away and then persuade him to stay?

A. You mean at the time?

Q. At the time we are talking about in the evening?

A. Well, I couldn't say so this time; hurt his feeling, you know, if I said that.

Q. Yes. Now, there were other places where Frank could get out through that house except through the door, weren't there?

A. Well, yes; there may be, but I thought that door was the principal place to go through, you know.

Q. Did you often keep that door locked?

A. No.

Q. Well, do you remember what side of the door that lock is?

A. Just a pass key; ordinary pass key.

Q. What side of the door is the lock?

A. What way—what size of lock?

459 Q. What side of the door. Now, where was he, was the door swinging, on what side is the lock?

A. On which side? I didn't understand.

Q. Yes.

A. He doesn't remember, but he says some little knob there was inside the door, he says.

Q. Yes; there is a knob on each side, isn't there?

A. Yes; I remember there was inside, inside.

Q. The door was inside?

A. Yes; from the inside of the door.

Q. Did you use to keep that door locked nights?

A. No.

Q. Did he ever keep it locked before this time?

A. No.

Q. Now, that—you had only one toilet in that place, didn't you?

A. Why, he said mine—I can't understand, whether yes or no. That is the difficulty of the Japanese language; in English that is just answered, but it is difficult in Japanese.

Q. I will get at it in a different way. Now, you boys who slept in the Japanese bunkhouse used the same toilet, just back of the Chinese bunkhouse?

A. You say back of the Chinese bunkhouse?

Q. Yes.

A. Most of them.

Q. Was there any other toilet near the Japanese or the Chinese bunkhouse, except this one shown on this map, plaintiff's Exhibit No. 2?

A. No.

Q. Then the boys in the Japanese bunkhouse as well as the
460 boys in the Chinese bunkhouse used this one toilet?

A. They used this; but a toilet in the cannery, too.

Q. How far away from this bunkhouse is the cannery?

A. This is the Chinese bunkhouse?

Q. That is the Chinese bunkhouse [indicating].

A. I don't know how far.

Q. It is about 2,000 feet; isn't it 1,500 or 2,000 feet?

A. Quite a way; I don't remember how far.

Q. Well, didn't you realize that to lock that door might cause a good deal of inconvenience, because it would stop the boys from getting into that toilet?

A. Well, the key was hanging on the wall, you know, and any time they can use the key.

Q. But you had never—you had never locked the door before, had you?

A. No.

Q. How much—well, how were the boys at the cannery paid? Take the Mexican boys, are they paid by the day, by the month, or by the season's work?

A. By the season.

Q. How much for the season?

A. I think \$140.00 season, with board and room.

Q. And room?

A. Well, of course, that is arranged by the contractor, you know.

Q. Well, that is all right, and that includes their fare back and forth from Seattle or San Francisco, as the case may be?

A. I don't know as to that. The contractor would know that. I don't know as to that, he says.

461 Q. Well, now, you stated that your employer would advance some money for Dunn to get him from Seattle up to the cannery. Was that money to be taken out of his wages?

A. Yes; got to come out of his wages.

Q. How much was that?

A. I can't say for sure now, but it was about between \$30 and \$40; something like that.

Q. That is \$30 or \$40; that is the fare from Seattle to the cannery?

A. What is that?

Q. That was the transportation from Seattle?

A. No, that wasn't it; that was contractor paid fare now, you know, paying the fare; that wasn't part of the fare.

Q. It wasn't a part of the fare?

A. No.

Q. Now, what was the \$30 for?

A. Other advance money.

Q. Advance money?

A. Yes.

Q. That had been paid on the contract?

A. What?

Q. That had been paid Dunn for his labor?

A. Of course, I can't say what it was used, but the boys buy things and in Seattle they get money from the contractor.

Q. Well, they get money enough to fit themselves out for the season's work, is that it?

A. Yes.

Q. Well, now then, would the \$30.00 include the transportation from Seattle to the cannery, or did it not?

A. You mean the transportation?

Q. Yes.

462 A. No.

Q. How much for the transportation?

A. I don't know.

Q. No. Well, did—did Dunn owe any more money to your employer than that?

A. I think there was some more, because he bought some stuff.

Q. How much was that, approximately?

A. I don't know.

Q. Well, couldn't you state approximately?

A. No; I don't know, but I know he was buying overalls and shoes and other things in Seattle.

Q. Now, where are those books?

A. I left with Ohta, and I don't know where it is now.

Q. And against that account you had about two or two and a half months of work from Dunn; is that correct?

A. Excuse me, I don't understand.

Q. Against that account charged to Dunn he had a credit for about two months' work; is that correct?

A. No; that wasn't it. The agreement is generally that they have to work for the season, otherwise there will be no pay.

Q. No pay?

A. No.

Q. The agreement is that they will be paid at the end of the season and not before; is that correct?

A. Yes; you are correct.

Q. Now, you have described everything that you did and said this evening of the 14th while you were hunting for Dunn and until he was killed, haven't you?

A. That is, he has said now everything?

Q. Well, everything in this testimony.

A. I say—well, not all of it.

Q. Well, you have got a very clear memory as to what
463 happened that night, haven't you?

A. Yes; pretty.

Q. Pretty clear?

A. Pretty clear; some things, of course, I don't remember; you know I was so excited.

Q. You don't remember that you pointed the gun at one of those fisher boys you met up in the Indian town, do you?

A. I don't remember; I don't know.

Q. You may have pointed that gun and forgotten it?

A. I don't think I did.

Q. Now, I wish you would tell us a little bit about the scabbard you say you had on that sword. What kind of scabbard was that? What was it made of?

A. Just made out of same material as this [indicating].

Q. As a matter of fact, didn't you have a sack around it?

A. Well, when I came from Seattle I had a big cloth bag around scabbard, you see.

Q. A cloth bag around the scabbard. Now, where did you keep that sword in the Japanese bunk house?

A. I keep it underneath the bed; underneath the pillow, you know, of my bed.

Q. Yes. You slept on that sword, didn't you?

A. Yes.

Q. Is that your signature to this affidavit?

A. Yes.

Q. You signed that yourself?

A. Well, I signed it, but I don't know what it is.

Q. Did you swear to it?

A. No; I don't think I did.

Mr. RUSTGARD. I will ask that it be detached, your honor, and given to the jury.

Mr. COBB. What is that, the application for witnesses?

464 Mr. RUSTGARD. Yes.

Q. In this affidavit you state in substance and effect, didn't you, that Frank Dunn first made a deadly assault upon you and Fushimi, and that after he had made that assault upon you you went home to the Japanese bunk house and procured your sword and gun and came back to defend Fushimi?

Mr. COBB. We object to that, and object to the statement being made to the jury.

The COURT. Possibly will be just as well to read the affidavit to the jury and let them draw their own conclusions.

Mr. RUSTGARD. That part has been already read in the cross-examination of Fushimi.

Mr. COBB. Read the whole thing again. The whole point is——

Q. (By Mr. RUSTGARD.) Didn't you swear in that affidavit: "That the circumstances surrounding said killing and leading up thereto were as follows: That the deceased made an unprovoked and deadly assault upon these defendants, knocking them down; that after the first assault and while the deceased was fighting with or beating the defendant, E. Fushimi, the defendant, O. Itow, procured a weapon for the purpose of defending himself and E. Fushimi from the deadly assault of the deceased, and when he returned so armed the deceased knocked said Itow down and off of a plank walk about five feet above the ground." Did you so swear?

A. Let me take the paper.

Q. I read only down to there.

A. No; it isn't quite right, he says.

The COURT. We will be at recess until two o'clock this afternoon.

465 (Thereafter at two o'clock of the same day court again convened, all parties being present as heretofore, the jury being in the box, whereupon the further cross-examination of the witness O. Itow was continued as follows:)

Q. (By Mr. RUSTGARD.) What became of that scabbard to the sword?

A. I haven't seen it.

Q. Did you ever look for it?

A. Yes.

Q. Where did you look for it?

A. Underneath the bridge, he says, that incline.

Q. When did you look for it?

A. The day—I think the day before I left the cannery.

Q. Now, when Frank struck you, where did he hit you?

A. There [indicating].

Q. All right, on the left eye, about?

A. Right there [indicating].

Q. What hand did he strike you with?

A. I used my right hand to strike with the sword.

Q. You used your right hand, but what hand did Frank use when he struck you?

A. I think it was the right hand.

Q. Were you facing Frank at the time he struck you?

A. Yes.

Q. Will you point out to the jury on this plaintiff's Exhibit 1-B where you were standing at the time Frank struck you?

A. I can't say for sure, because I was running towards the door, you know; but must be three or four feet away from the door.

Q. Where was Frank standing?

A. Frank was just about there. I meant to say Frank was
466 just about three or four feet from.

Q. Where did you fall then?

A. I think it was somewhere around here, but I can't say for sure.

Q. How far from the lower end of the incline?

A. You mean where he fell?

Q. Yes.

A. I don't know.

Q. Couldn't tell approximately how far you fell from?

A. I can't say because when I got up, you know, I was dizzy, so I couldn't tell just about where it was. When they were throwing things on me, I think I was just about here.

Q. I am talking now about where you fell. Now, did you fall on your back or on your stomach?

A. I think I was on back like this [indicating].

Q. You sat?

A. I can't, of course, remember just how I fell, you know, but I think I squat down kind of like that [indicating]. Of course, I can't say.

Q. Did that make you dizzy?

A. Yes.

Q. Now, how long did you sit that way?

A. Just until I got up, you know; only a little time.

Q. Now, you said on your direct examination that Frank fell on top of you?

A. He fell—he fell over me, you see.

Q. How did he come over you, explain to the jury?

A. Of course, I can't say; I was hurt hard, you know, but he fell over me.

Q. Now, did he touch you when he fell over you?

A. I am not sure, but I think he. I felt him, you know.

467 Q. Now, after Frank fell over you, did he fall down on top of you?

A. I felt him somewhere around here [indicating], but I can't say whether he was right over me or not; was so sort of down, you know, I was excited.

Q. Did you feel him over your chest, pressing over your chest?

A. You mean Frank over him?

Q. Yes.

A. I felt down here, I remember, but I can't say.

Q. Well, you must have been lying on your back then to feel that?

A. No; I don't think so.

Q. No. Well, how long was Frank resting on you that way?

A. Well, just only, only just a little while, I can't say how long, you see.

Q. Well, where did Frank go to after that?

A. I got up with the sword and I went off, but I don't know how he got off and where he went.

Q. Well, how far did he go to?

A. I can't tell.

Q. Did he stand up in front of you?

A. I don't know as to that.

Q. How did you get your sword out of him? Did you pull it out?

A. I didn't know; I just had my sword in my hand and got up, that is all.

Q. And didn't—didn't Frank get up and pull the sword out of himself?

A. No.

Q. Did you look for Frank any more that night to see what became of him?

468 A. No; I didn't go; I didn't feel like it.

Q. Didn't feel like it. Did you look to see what became of him?

A. I didn't go.

Q. Well, couldn't you tell how far away from that incline he was lying?

A. No; I did not.

Q. Didn't you think that he run down to the superintendent's?

A. He; you mean Frank?

Q. Didn't you think that Frank ran down to the superintendent's?

A. No; I didn't think so.

Q. Did you see any blood on your sword at that time?

A. The sword?

Q. Yes.

A. No; I didn't notice.

Q. Did you have your gun in your right hand at the time?

A. No.

Q. What hand did you have the gun in?

A. My left hand.

Q. When did you first find out there was some trouble with that pistol of yours?

A. What is it?

Q. When did you first find out that that gun of yours was defective?

A. Long time ago.

Q. Long time ago. That works pretty good, don't it. Small hand of yours could work this fine? What? Didn't discover that this forenoon, did you?

A. When did he, you mean?

Q. Yes.

A. No; I had it for six years and I know it long time.

Mr. RUSTGARD. That is all.

469 Redirect examination:

Q. (By Mr. COBB.) One or two other questions I want to ask. It may be part of it—part of it may be, I should have brought it out before. It is a matter that I omitted. I would ask leave to ask the questions.

The COURT. You may.

Q. (By Mr. COBB.) You stated this morning that you found out from the boys during the breakfast next day Frank had been killed. Now, state whether after that you told the Japanese boys there how this killing took place?

Mr. RUSTGARD. Just a moment, I will interpose an objection to that as simply a self-serving declaration on his part.

Mr. COBB. I am not going to ask him what it is.

The COURT. I think it may stand as it is.

Mr. COBB. Has the answer been given? You haven't translated?

INTERPRETER. No. "Yes; I did;" that was the answer.

The COURT. That is the way I meant the record to stand, with his answer in, of course.

Mr. COBB. That is all.

Mr. RUSTGARD. That is all.

The COURT. Call a witness.

Mr. COBB. I want to recall Fushimi for one question that I forgot.

The COURT. Take the stand.

470 ED. FUSHIMI, heretofore duly sworn, being recalled, testified further as a witness for the defense, to wit:

Direct examination:

Q. (By Mr. COBB.) How much do you weigh about, as near as you know?

A. 130. I should think.

Q. How long—he hasn't weighed in quite awhile, has he?

A. I haven't weighed myself for three or four years.

Mr. COBB. That is all.

Mr. RUSTGARD. That is all.

Mr. COBB. Call Nakayama.

* * * * *

477 The COURT. Prosecution rests.

Mr. COBB. I would like to see the instructions.

The COURT. I have read over yours and in the main they are instructions that will be covered; may be something that won't. I am hardly able to tell even the others that will be refused at this time, because I haven't had any opportunity to go over them.

Mr. COBB. I don't desire to be captious in the matter, but this is a statutory right and in view of the many disadvantages I have labored—

The COURT. I don't understand it is at all. It is a right I might give you if your instructions had been given me, but haven't—just handed me.

Mr. COBB. Of course, might have prepared earlier.

Mr. RUSTGARD. That statute provides that the request has got to be made before the trial opens.

Mr. COBB. Let's see.

THE COURT. There is no question about it. I have never had the question before me, but I have no doubt about it. In a majority of the cases the attorneys do just as in this case—he makes the request for instructions about the time you begin to argue and I have got to go over the instructions at the time you begin your argument. I will be glad, however, if requested instructions are handed me early enough. I would be very glad in a general way to let the attorneys know about how I am going to put the instructions.

MR. COBB. The instructions in this case will be in writing?

THE COURT. They will. You may proceed.

478 Whereupon argument of counsel was had by the respective counsel and the court read its instructions to the jury.

MR. COBB. I reserve an exception to the last phrase in the last instruction.

THE COURT. I correct the last instruction by adding the words “or plaintiff.” Now I will read it to you.

(Court rereads the last instruction.)

MR. COBB. We will reserve exceptions to all the instructions that were refused.

THE COURT. Only one refused.

479 United States vs. Itow & Fushimi.

Plff's Ex. 6.— R. E. R.

In the District Court for the Territory of Alaska, Division No. One,
at Juneau.

UNITED STATES OF AMERICA, PLAINTIFF,	} 863-B.
v.	
O. ITOW AND E. FUSHIMA, DEFENDANTS.	

Application for process for witnesses for defense.

UNITED STATES OF AMERICA,

Territory of Alaska, ss:

O. Itow and E. Fushimi, being first duly sworn, each for himself, and not one for the other, deposes and says that the testimony of Tanamachi and Nakayama, Japanese fishermen, and Oogong, a China boss or foreman, is material to the defense of this case; that affiants can not safely go to trial without the testimony of said witnesses; that they expect to prove by the witness Nakayama that he was an eyewitness of the killing of which defendants stand charged; that the circumstances surrounding said killing and leading up thereto were as follows:

That the deceased made and unprovoked and deadly assault upon these defendants, knocking both of them down; that after the first assault and while the deceased was fighting with, or beating, the

defendant, E. Fushima, the defendant, O. Itow, procured a weapon for the purpose of defending himself and E. Fushima from the deadly assault of the deceased, and when he returned so armed the deceased knocked said Itow down and off of a plank walk about
480 five feet above the ground, and thereupon said deceased either fell or sprang from said platform upon said Itow who was at said time upon the ground beneath, and either sprang or fell upon the point of a sword in the hands of said Itow and was thereupon run through the body and killed; they further expect to prove by said witnesses that the said Fushima was at no time during the fracas, armed, and took no further part therein than to escape from the deceased.

Defendants expect to prove by the witness, Tanamachin, that he was present on the ground a few minutes after the killing and is familiar with the situation at that time, and his testimony as to all said circumstances will tend to corroborate strongly the theory of the defense and to contradict the testimony of some of the witnesses for the Government and to show a strong motive for hostility on the part of some of the Government witnesses.

Defendants further expect to prove by all said witnesses that for some time prior to the fracas in which deceased was killed there had existed a fixed animosity on the part of the deceased toward defendants on account of race prejudice, and deceased had repeatedly threatened defendants with personal violence; and that on the evening immediately preceding the homicide, which occurred about midnight, deceased had procured a large quantity of liquor, and became intoxicated, and was lying in wait for the purpose of attacking defendants at the time the fracas began.

Affiants state that they are credibly informed, and therefore allege, that said Nakayama and Tanamachi are at their homes in the city of Seattle, State of Washington, and that the said Oogong
481 is at his home in the city of Portland, State of Oregon; that these defendants, nor either of them, is possessed of sufficient means and is actually unable to pay the fees of such witnesses or the marshal's fees for subpoenaing them.

Therefore defendants pray that the court may be pleased to make and order directing said witnesses subpoenaed and their attendance compelled at the expense of the Government.

O. ITOW.

ED. FUSHIMI.

Subscribed and sworn to before me this 20th day of December, 1912.

J. H. COBB,

Notary Public in and for Alaska.

Filed Dec. 20, 1912. E. W. Pettit, clerk, by C. Z. Denny, Ass't. Original. In the District Court for the Territory of Alaska, Division No. One, at Juneau. United States of America, plaintiff, vs. O. Itow and E. Fushima, defendants. Application for process for witnesses for defense.

UNITED STATES OF AMERICA,

District of Alaska, Division Number One, ss:

I, R. E. Robertson, official court stenographer for the first division of Alaska, hereby certify that the foregoing and hereto attached typewritten pages, numbered from one to four hundred and forty-five, both inclusive, contain a full, true, and complete transcript, as the same was extended by me from my shorthand notes taken in said cause, of the testimony and evidence adduced at said trial, the documentary exhibits being contained therein.

Dated at Ketchikan, Alaska, May 19, 1913.

R. E. ROBERTSON.

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485 And thereupon the defendants, before the jury retired to consider of their verdict, prayed the court to instruct the jury as follows:

"The law gives the defendants a right to testify in their own behalf and they have done so in this case and made their statement. In a case of this kind you should determine whether that statement is corroborated substantially by proven facts; if so it is strengthened to the extent of its corroboration. If it is not so strengthened in that way you are to weigh it by its own inherent truthfulness, its own inherent proving power that may belong to it. In weighing defendants' testimony you are to be guided by the same rules that should guide you in weighing the testimony of any other witness, taking into consideration their interest in the result, the probability or the improbability of the facts they state and whether it is corroborated by the other proven circumstances in the case."

But the court refused said prayer, to which ruling of the court the defendants then and there accepted.

And the defendants further prayed the court to instruct the jury as follows:

"Before the jury can convict the defendants every member of the jury must be satisfied beyond a reasonable doubt of their guilt.

"The burden is upon the Government and it is the duty of the Government to show beyond all reasonable doubt and to the exclusion of every other hypothesis every circumstance necessary to show that the defendants are guilty as charged; and unless the Government has done this in this case it is your duty to acquit. Before you can
486 convict you must be satisfied to a moral certainty, not only that the proof is consistent with the guilt of the defendants, but that it is wholly inconsistent with any other rational conclusion."

But the court refused said instructions, to which ruling of the court the defendants then and there accepted.

At the same time the defendants prayed the court to instruct the jury as follows:

"You are instructed that the killing of a human being is justifiable when committed to prevent the commission of a felony upon the

person of the slayer or upon his servant or in the lawful attempt to suppress a riot or preserve the peace. So in this case if you find and believe from the evidence that the deceased, Frank Dunn, was attempting to commit a felony upon the persons of Nanayama and Fushimi, and that Itow was foreman in charge of said Nakayama and Fushimi, and that in the attempt on the part of Itow to prevent the commission of such felony the deceased was killed; or if you have a reasonable doubt as to whether the deceased did not loose his life in that way, then you must acquit.

"It would also be your duty to acquit if you believe at the time Itow reached the scene of the fatality there was a riot in progress or a breach of the peace was taking place and Itow was making a lawful attempt to suppress such riot or preserve the peace or if you have a reasonable doubt as to whether the killing did not so occur; in either case the defendants are not guilty."

But the court refused said prayer, to which ruling the defendants then and there accepted.

And thereupon the court instructed the jury as follows:

487 In the District Court for the District of Alaska, Division Number One, at Juneau.

THE UNITED STATES OF AMERICA,	} No. 863-B.
v.	
O. ITOW AND E. FUSHIMI, DEFENDANTS.	

INSTRUCTIONS TO JURY.

GENTLEMEN OF THE JURY:

I.

The above-named defendants, O. Itow and E. Fushimi, are accused by the indictment in this case, and are now on trial before you, for the crime of murder in the first degree.

The indictment charges that the said defendants, O. Itow and E. Fushimi, at or near Dundas Bay, within said District of Alaska, and within the jurisdiction of this court, on the 14th day of July, 1912, being then and there of sound memory and discretion, did purposely, wilfully, unlawfully, maliciously, and feloniously, and of their deliberate and premeditated malice aforethought, kill and murder one Frank Dunn, then and there a living male person, by then and there, with the intent and purpose aforesaid, stabbing and thrusting a sharp steel sword, with a cutting blade twenty-three inches in length and one inch in width, into the left shoulder and into and through the body and trunk of him, the said Frank Dunn.

488

II.

The jurors are instructed that the indictment in this case is of itself a mere formal charge against the defendants and is not of itself

the slightest evidence of their guilt, or of either of them, and no juror should permit himself to be influenced in the slightest degree against the defendants because or on account of the indictment in case.

489

3.

You are instructed that the burden of proof in this case is upon the United States and that the defendants are presumed to be innocent of the charge contained in the indictment and of the crimes necessarily included therein, as hereinafter instructed, and such presumption continues with them until the same is removed by competent evidence convincing the jury of their guilt beyond a reasonable doubt. And, acting upon this presumption, you should acquit the defendants unless you are satisfied beyond a reasonable doubt, from the evidence, of their guilt of the crime charged in the indictment or of any lesser degree thereof or of any of the crimes necessarily included therein.

This presumption of innocence is not an idle phrase, but is a substantial right of the defendants and guards and protects them at every stage of the trial until you are satisfied of their guilt beyond a reasonable doubt.

490

4.

Before the jury can convict the defendants every member of the jury must be satisfied beyond a reasonable doubt of their guilt.

The burden is upon the Government and it is the duty of the Government to show beyond all reasonable doubt and to the exclusion of every other hypothesis every circumstance necessary to show that the defendants are guilty as charged; and unless the Government has done that in this case it is your duty to acquit. Before you can convict you must be satisfied to a moral certainty not only that the proof is consistent with the guilt of the defendants, but that it is wholly inconsistent with any other rational conclusion.

491

5.

The court further instructs the jury that to warrant the conviction of the defendants each fact necessary to establish their guilt must be proven beyond a reasonable doubt by competent evidence, and if you have a reasonable doubt as to any material fact necessary to establish the guilt of the defendants then it is your duty to acquit.

492

6

Your duty to society and these defendants obligates each of you to give your earnest and careful attention and consideration to every feature of the case now on trial before you, so that the defend-

ants may not be unjustly convicted nor wrongfully acquitted. Under the solemnity of your oaths as jurors you must consider all of the evidence in the case under the law given to you by the court in these instructions; and upon the law and the evidence you must reach, if you can, a just verdict, which the law and the rights of the defendants demand of you.

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7

In this case, as in all criminal cases, the jury and the judge of this court have separate functions to perform. It is your duty to hear all the evidence, all of which is addressed to you, and thereupon to decide and determine the questions of fact arising from the evidence. It is the duty of the judge of this court to decide the questions of law involved in the trial of the case; and the law makes it your duty to accept as law what is laid down as such by the court in these instructions. But your power of judging the effect of the evidence is not arbitrary, but to be exercised with legal discretion and in subordination to the rules of evidence.

494

8.

You are instructed that section 3 of the Penal Code for the District of Alaska provides as follows:

"Murder, first degree. That whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree and shall " be punished as herein provided.

You are further instructed that section 5 of said penal code provides as follows:

"Murder in the second degree. That whoever purposely and maliciously, * * * kills another is guilty of murder in the second degree, and shall be " punished as herein provided.

You are further instructed that section 6 of said penal code provides as follows:

"Manslaughter. That whoever unlawfully kills another " * * * but under such circumstances as not to constitute murder in either degree, " is guilty of manslaughter, and shall be punished " as herein provided.

495

9.

You are instructed that under our law all persons concerned in the commission of a crime and whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, are principals and are to be tried and punished as such.

496

10.

The term "purposely" means intentionally, not accidentally, and in the absence of qualifying acts and circumstances the law presumes that a person intends the ordinary and probable results of his own acts and conduct.

"Malice," as used in these instructions, does not mean spite, dislike, or ill-will as it is ordinarily understood, but it means that condition of the mind that prompts one person to take the life of another without just cause or justification and it signifies a state of disposition which shows a heart regardless of social duty and fatally bent on mischief.

In the absence of qualifying acts and circumstances both the purpose to kill and malice in its legal sense may be presumed from the unlawful and intentional use of a deadly weapon in a manner likely to produce death.

The words "deliberate" and "premeditated," as used in the statute, mean only this: That the slayer must intend before the act is committed, though it be only for an instant of time before, that he will strike at the time he does strike, and that death will be the result of his act; or in other words, if the slayer had any time to think before the act—however short such time might have been, even a single moment—and did think, and he committed the act as the result of the intention to kill produced by this even momentary operation of the mind, and death ensued, it would be a deliberate and premeditated killing within the meaning of the statute defining murder in the first degree.

497

11.

It is your duty to determine from all the evidence in this case whether the defendants, O. Itow and E. Fushimi, did kill Frank Dunn in the manner and form charged in the indictment or not; and if you find and believe from the evidence beyond a reasonable doubt that they did kill Frank Dunn at the time and place mentioned in the indictment and in the manner therein charged you are then to determine from the evidence under the instructions of the court whether they are guilty of the crime charged in the indictment or of a lesser degree thereof or any crime necessarily included therein as you shall be hereinafter instructed.

498

12.

It is not sufficient for the Government to prove, merely, that the deceased, Frank Dunn, lost his life by a wound inflicted by a sword in the hands of the defendant, Itow, but it must go further, and show by the evidence, that the wound was inflicted and death caused purposely and premeditatedly by the defendants, and if from a

fair and full consideration of all the evidence you have a reasonable doubt as to how the deceased lost his life, it is your duty to resolve that doubt in the favor of the defendants.

499

13.

You are further instructed that the crimes charged in the indictment herein are murder in the first degree, murder in the second degree, and manslaughter, and that you may find the defendants, or either of them, guilty of the crime of murder in the first degree, murder in the second degree, manslaughter, or not guilty, according as you find the evidence warrants under these instructions.

Murder in the first degree:

You are instructed that if you find and believe from the evidence in this case beyond a reasonable doubt that the defendants, or either of them, at the time and place mentioned in the indictment, being then and there armed with a sword, did then and there feloniously and wilfully and purposely and of deliberate and premeditated malice kill the said Frank Dunn in the manner and form charged in the indictment, without legal justification therefor, then your verdict should be that the defendants, or whichever defendant did so kill him, the said Frank Dunn, if you find and believe from the evidence in this case beyond a reasonable doubt that only one of said defendants did so kill the Frank Dunn, are guilty of murder in the first degree.

500 In this degree of felonious homicide there must be the elements of purpose, premeditation, and malice. If any of these elements be lacking there can be no conviction for murder in the first degree. Purposely as used in the law and in these instructions means intentionally. Deliberate and premeditated malice means that kind of malice resulting from thought and reflection—it is intentional. Premeditated malice is where an intention to unlawfully take life without legal cause or excuse is deliberately formed in the mind and that determination meditated upon before the fatal stroke was given. There need be no appreciable space of time between the formation of the intention to kill and the killing; it is only necessary that the act of killing be preceded by a concurrence of the will, deliberation and premeditation on the part of the slayer or slayers.

Malice is not confined to ill-will toward an individual, but is intended to denote an act flowing from any wicked and corrupt motive. A thing done with a wicked mind and attended with such circumstances as plainly indicate a heart regardless of social duty and fully bent on mischief indicates malice within the meaning of the law; hence malice is implied from any deliberate and cruel act against another, however sudden, which shows an abandoned and malignant heart. Malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation

appears or when the circumstances attending the killing show an abandoned and malignant heart.

501 You are further instructed that before you can find the defendants guilty of murder in the first degree you must also find from the evidence in the case beyond a reasonable doubt that at the time of the commission of the act with which they are charged the defendants were of sound mind, memory, and discretion.

502 You are instructed that the law presumes that every one charged with a crime is sane, and thus supplies in the first instance the required proof of capacity to commit crime. It authorizes the jury to assume at the outset of the case that the accused is criminally responsible for his acts, and, unless the evidence and circumstances in the case indicate the contrary, the defendant is presumed to be sane and responsible for his acts.

503 Murder in the second degree:

You are instructed that the crime of murder consists of two degrees: First and second; and that upon an indictment for a crime consisting of different degrees the jury may find the defendant not guilty of the crime charged in the indictment and guilty of any inferior degree thereof.

You are instructed, however, that this is not an arbitrary power on your part to be exercised or withheld at pleasure, but is a legal duty to be exercised by you in strict conformity with the rules of law.

In this case if the evidence is such as to convince you beyond a reasonable doubt that the defendants are guilty of the crime of murder in the first degree, as heretofore explained, then you should not refuse to convict for that degree and through sympathy, or otherwise, return a verdict for a lesser degree or lower offense.

It is the duty of the prosecution to prove every necessary and material part of the crime charged against the accused beyond a reasonable doubt, and if this is once done it is your duty to give effect to that evidence and the law and bring in a verdict accordingly.

You are instructed that whoever purposely and maliciously, but without deliberation and premeditation, kills another is guilty of murder in the second degree. In this connection you are instructed that purposely means intentionally and without legal excuse or justification; that maliciously means that it was done wrongfully and intentionally without legal excuse or justification.

504 Manslaughter:

You are instructed that manslaughter is the killing of a human being unlawfully and wilfully, but without malice, premeditation, or deliberation.

You are instructed that while the defendants in this case are charged in the indictment with murder in the first degree, the law provides that in all cases the defendant may be found guilty of any crime, the commission of which is necessarily included within that with which he is charged in the indictment; and you are instructed

that the crime of manslaughter is necessarily included in that of murder in the first degree. You are likewise instructed that your power of finding the defendants guilty of the lesser offense necessarily included in the greater is not an arbitrary power to be exercised or withheld at pleasure, but it is a duty to be exercised by you in strict conformity with the rules of law; and in this case, if you are convinced beyond a reasonable doubt that the defendants are guilty of murder in the first degree, you should say so by your verdict; if you shall find that the defendants are not guilty of murder in the first degree, but are guilty of murder in the second degree, you should say so by your verdict; if you shall find that the defendants are not guilty of murder in the first degree, or of murder in the second degree, then you should consider whether or not they are guilty of manslaughter.

505

14

You are further instructed that section 143 of the Code of Criminal Procedure of the District of Alaska provides as follows:

"That when it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only."

15

If you find and believe from the evidence in this case beyond a reasonable doubt that the defendants killed the said Frank Dunn in the manner and form charged in the indictment, and thereby committed murder, and there is a reasonable doubt in which degree, the first or the second, they are guilty, they can be convicted of the lesser or second degree only; and if you have a reasonable doubt as to whether they are guilty of either of those degrees or manslaughter, then they can be convicted of manslaughter only.

You are instructed that this power of fixing the degree of the crime is not an arbitrary one, to be exercised or withheld at your pleasure, but it is a legal duty to be performed by you in strict conformity with the rules of law as laid down in these instructions; but if you are not satisfied from the evidence beyond a reasonable doubt that the defendants are guilty of murder in the first degree, or murder in the second degree, or manslaughter, then you should find the defendants not guilty.

506

16.

You are further instructed that the law of Alaska provides that in all cases where any person accused is found guilty of murder in the first degree the jury may qualify their verdict by adding thereto the words "without capital punishment." And whenever a jury shall return a verdict so qualified the person shall be sentenced to imprison-

ment in the penitentiary at hard labor for life; and that if you return a verdict for murder in the first degree without so qualifying it the penalty shall be death.

507

17.

In this case there are two defendants on trial before you. You are, therefore, instructed that if you find and believe beyond a reasonable doubt from the evidence in this case that one of said defendants is guilty of said crime charged in the indictment or any lesser degree thereof, or any crime necessarily included therein, and that the other of said defendants is not guilty, then you should return your verdict accordingly; or if you should find and believe beyond a reasonable doubt from the evidence that one of said defendants is guilty of said crime charged in the indictment or any lesser degree thereof, or any crime necessarily included therein, and that the other of said defendants is guilty of a different degree of said crime charged in the indictment, or any crime necessarily included therein, you should return your verdict accordingly; in other words, it will not be necessary in case you find and believe beyond a reasonable doubt that the evidence does not so warrant to bring in a verdict of guilty against each of said defendants for the same degree of the crime charged, in case you find and believe from the evidence beyond a reasonable doubt that they are guilty of different degrees thereof.

508

18.

The killing of a human being is excusable when committed:

First. By accident or misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent; or

Second. By accident or misfortune in the heat of passion, upon a sudden and sufficient provocation, or upon a sudden combat, without premeditation, or undue advantage being taken, and without any dangerous weapon or thing being used, and not done in a cruel or inhuman manner.

Therefore, if you find and believe, or there is a reasonable probability sufficient to raise a reasonable doubt, that when Itow arrived at the front of the China bunk house he was engaged in a lawful act by lawful means and acted with usual and ordinary caution in view of the surrounding circumstances and without any unlawful intent, and that the deceased then and there set upon the said Itow, knocking him down, and the deceased then sprang upon him, and in so doing was run through the body by the sword in the hands of Itow, and that such stabbing was accidental—that is, was inflicted by the force of the fall of the deceased upon the sword in some way—and the wound was not intentionally inflicted by Itow, then you should acquit.

You are further instructed in this connection that if at the time that Itow arrived at the bunk house he was attacked by the deceased, and in the combat that followed deceased lost his life by being run through the body with a sword, but that the wound was not intentionally inflicted, but by accident in falling upon it, but was solely the result of the melee in which the deceased and Itow were engaged, but through no fault of Itow—if you find they were so engaged, then you should acquit.

509

19.

It is claimed in the part of the defendant, O. Itow, that he sent two other Japanese, namely, E. Fushimi and Nakayami, to lock the door of the China bunk house, in which the deceased had his sleeping quarters, but when Fushimi and Nakayama reached the China bunk

house they became engaged in an altercation or fight with the deceased which attracted the attention of the defendant, Itow, and he thereupon armed himself with a sword and pistol and went to the scene of the fight, intending to frighten the participants in the fight and thereby causing them to desist; that when he reached the gang-plank leading to the door of the China bunk house he was himself attacked by the deceased and knocked down with the sword in his hand, and that while still upon the ground the deceased either fell or sprang upon him and was accidentally run through the body by the sword; and the court instructs you, as a matter of law, that if you find and believe from the evidence that the death of the deceased was brought about in the manner stated, or if you have a reasonable doubt, as that term has been defined to you, whether it was not so brought about, then you can not convict the defendant, O. Itow, of murder.

510

20.

It is not claimed by the Government in this case that the defendant, E. Fushimi, himself, inflicted the fatal wound or any wound upon the deceased, Frank Dunn. He is guilty of the offense, if guilty at all, because of his aiding and abetting his co-defendant, O. Itow, in the commission of the fatal act, either by pushing the deceased, Frank Dunn, out of the door of the China bunkhouse, there to be set upon and killed by his co-defendant, O. Itow, or by holding or aiding or holding to hold the deceased while the fatal wound was being inflicted.

And in determining the question of the guilt of E. Fushimi you are to take into consideration the different versions, if any, given by the witnesses for the Government, as well as the testimony for the defense, and if upon the whole case, as made by the evidence, you have a reasonable doubt, as that term has been explained to you, of the guilt of said Fushimi, you should acquit him.

511

21.

The court further instructs you that before you can convict the defendant, E. Fushimi, of murder you must not only believe beyond a reasonable doubt that he pulled or pushed or aided in pulling and pushing said deceased out of the bunkhouse, or held or aided in holding him, but that the acts so done were done for the purpose and with the intention of bringing about and aiding in the killing of the deceased.

512

22.

The jury are instructed that the defendants are not on trial for the shooting of the witness, Costello, and you can only consider the evidence of the shooting of said witness for the purpose of showing the motive, if any, of which the deceased was killed, if you find he was voluntarily killed by the defendants; and unless you find and believe that the shooting of the witness, Costello, in some way throws light upon the motive in which the defendants acted in the transaction for which they stand charged, you will disregard entirely the evidence as to the shooting of said Costello.

513

23.

While voluntary intoxication is no excuse or palliation for any crime actually committed, yet if upon the whole evidence in this cause you shall have a reasonable doubt whether at the time of the killing, if you should find from the evidence that the defendants wilfully killed the deceased, they had sufficient mental capacity to deliberately think upon and rationally to determine so to kill the deceased, then you can not find the defendants guilty of murder in the first degree, although such inability was the result of intoxication, unless you further find from the evidence that the intoxication was voluntary and with the purpose of committing the crime of murder of the deceased Frank Dunn, as alleged in the indictment in this case.

514

24.

The term "reasonable doubt" as defined by the law and as used in these instructions means that state of the case which, after a careful comparison and consideration of all the evidence in the case, leaves the minds of the jury in that condition that they can not feel an abiding conviction amounting to a moral certainty of the truth of the charge. The term "reasonable doubt" does not mean every doubt, but such a doubt must be actual and substantial, as contradistinguished from some vague apprehension, and must arise from the evidence, or from the want of evidence, or from both such sources. A reasonable doubt is not a mere whim, but is such a doubt as arises from a careful and honest consideration of all the evidence in the

case; and the evidence is sufficient to remove all reasonable doubt when it convinces the judgment of ordinarily prudent men of the truth of a proposition with such force that they would act upon the conviction without hesitancy in their own most important affairs. Proof beyond all reasonable doubt does not mean proof beyond every doubt. Absolute certainty in the punishment of a crime is rarely obtainable and never required.

515

25.

You are instructed that you are the sole judges of the credibility of the witnesses appearing before you and of the reasonableness of their testimony and of the weight to be given their evidence.

If you find any witness has wilfully testified falsely in any material part of his testimony in this case you may distrust any part or all of the testimony of such witness, unless the same is corroborated by other credible evidence in the case. And if you find and believe that any witness has wilfully testified falsely in this case you are at liberty to reject the entire testimony of such witness, unless the same is corroborated by other credible evidence in the case; but you are not bound to reject the entire testimony of any witness. In case you find any of his testimony to be false you should reject the false part and give such weight to the other portions as you think they are justly entitled to receive. You should not fail to weigh and consider fairly and give proper effect to all evidence which you consider *true* and *truthful*.

516

26.

You are instructed that you should not consider any evidence sought to be introduced but excluded by the court, nor should you consider any evidence that has been stricken from the record by the court, nor should you consider in reaching your verdict any knowledge or information known to you not derived from the evidence as given by the witnesses upon the witness stand.

You should not allow prejudice or sympathy to swerve you in reaching a verdict according to the evidence and the law as given to you by the court. Whatever verdict is warranted under the evidence and the instructions of the court, you should return as you have sworn so to do.

The character and degree of the punishment is to be determined by the court, within the limits fixed by law, and you are instructed that you should not consider the matter of the punishment in making up your verdict, except as hereinabove mentioned.

517

27.

You are instructed that in considering the evidence in this case you are not bound to find a verdict in conformity with the declarations

or testimony of any number of witnesses when their evidence does not produce conviction in your mind against a lesser number of witnesses or a presumption or other evidence which is satisfying to your mind. The weight of the evidence does not depend so much upon the number of witnesses who testify, as upon the character and probability of the facts stated by them and upon the character and reasonableness of their testimony and the opportunity the witnesses had for seeing and knowing the facts stated by them.

518

28.

You are instructed that the evidence is to be estimated not only by its own intrinsic weight, but also according to the testimony which it is within the power of one side to produce and of the other side to contradict; and, therefore, if the weaker and less satisfying evidence is produced when it appears that it was within the power of the party offering the same to produce a stronger and more satisfying evidence such evidence, if so offered, should be viewed with distrust.

519

29.

In determining the credit you will give a witness and the weight and value you will attach to his testimony you should take into account the conduct and appearance of the witness on the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to or feeling for or against the defendants; the probability or improbability of the statements of the witness; the opportunity he had to observe and to be informed as to the matters respecting which he gave testimony before you; and the inclination he evinces, in your judgment, to speak the truth or otherwise, as to the matters within the knowledge of such witness.

30.

It is your duty to give to the testimony of each and all of the witnesses such credit as you consider their testimony justly entitled to receive; and in doing so you should not regard the remarks or expressions of counsel, unless the same are in conformity with the facts proved, or are reasonably deducible from such facts and the law as given to you in these instructions.

521

31.

You are instructed that you should give the testimony of all the witnesses in this case fair, candid, and careful consideration. The fact that some of them are Japanese, Chinamen, and Mexicans would not justify you in discarding their testimony. You should, therefore, consider the testimony of each witness, be he Japanese, China-

man, Mexican, or white man, carefully and without prejudice, and give whatever credit to such testimony your judgment determines it is entitled to receive.

522

32.

You are instructed that a person charged with the commission of a crime shall at his own request, but not otherwise, be deemed a competent witness in his own behalf, the credit to be given to his testimony being left solely to the jury under the instructions of the court.

You are instructed that in this case the credit to be given to the testimony of the defendants is left solely to you, and you should give it the same fair and candid consideration you do the testimony of other witnesses in the case; but you are entitled to take into consideration the interest of the defendants in the result of this trial as affecting or bearing upon their credibility.

523

33.

You are further instructed that one of the modes of impeaching a witness is by showing that he has made statements out of court at variance with his statement on the witness stand; and if the jury believe from the evidence that any witness has made statements at another time and place at variance with his evidence in this case, regarding any material matter testified to by him, then it is the province of the jury to determine to what extent this facts tends to impeach his memory, or his credibility, or detracts from the weight which ought to be given to his testimony.

524

34.

The court instructs you that where evidence is given tending to show admission made by a defendant in a criminal case the defendant is entitled to have the whole statement or admission heard and considered by the jury as well as that part, if any, which make against him as well as that part which make for him. And you are also to consider the circumstances under which alleged admissions were made—the position of the defendant at the time, his surroundings, his strength of mind, his capacity to correctly understand the purport of the questions put him, together with all the testimony in the case upon that point.

525

35.

In considering the statement made by the defendant, Fushimi, to the district attorney, you must consider the whole statement together. He is entitled to the benefit of what he said in his own behalf, if you

believe it is true; but if you do not believe it is true you are not bound to believe and consider it because proven by the Government. You should consider such statement, however, with caution on account of the liability of error or misunderstanding. And in this connection you are also to consider the explanation, if any, which the said defendant may have given concerning the said statement.

526

36.

The defendants have testified as to their actions and conduct on the night when the deceased was killed and there is also the evidence of other witnesses as to such actions and conduct.

You are to consider this evidence in connection with all the other evidence in the case and inquire whether the actions and conduct of the defendants were indicative of innocence or guilt and are consistent with the hypothesis that these defendants criminally caused the death of the deceased or were innocent of any criminal intent.

527

37.

You are instructed that it has appeared necessary to the court to give to you, for your consideration, instructions concerning all the material evidence given during the trial, upon the assumption that you may find different conclusions depending on the truthfulness of the testimony. Therefore, you will be instructed upon the facts as claimed they exist by the Government and also upon the facts as they are claimed to be proven by the defendants. But you will adopt the theory under the instructions which you believe to be based upon truthful testimony.

528

38.

You are instructed that it has appeared necessary to the court to give many instructions in this case and you should be careful in your consideration of the same to give due weight and effect to all and consider them so far as is possible together as one whole rather than to pick out some particular one and base your verdict upon it to the exclusion of other pertinent and relevant parts of these instructions.

529

39.

With these instructions which I have just read to you I hand you blank forms of verdict, which you will take to your jury room and, after considering and weighing the evidence in the case under the law as given to you, you will return when you have unanimously agreed upon the same a verdict as against or for each of the defendants which you find and believe the evidence warrants you in finding

in order the rights of these defendants and of society may be preserved.

Dated this 13th day of January, 1913.

PETER D. OVERFIELD,
Judge of the District Court.

(Endorsed:) Filed Jan. 13, 1913. E. W. Pettit, clerk. No. 863-B. In the District Court of the United States for the Div. No. 1 of Alaska. The United States of America vs. O. Itow and E. Fushimi. Instructions to jury.

530 And the jury, having rendered a verdict against the defendants, the defendants within one day after the rendition of said verdict filed their motion for new trial as follows, to wit:

MOTION FOR A NEW TRIAL.

In the District Court for Alaska, Division No. One, at Juneau.

UNITED STATES OF AMERICA, PLAINTIFF,	}
<i>vs.</i>	
O. ITOW AND E. FUSHIMI, DEFENDANTS.	

Now come the above-named defendants and move the court to set aside the verdict of the jury herein and grant them a new trial of this cause on the following grounds, to wit:

First. For the refusal of the court to grant the defendants' motion and request for a postponement of this trial until the arrival of the defendants' witnesses and in compelling the defendants to go to trial until their counsel had had an opportunity of seeing said witnesses and making preparation for such trial, which ruling and action of the court was greatly prejudicial to the defendants and prevented them having a fair trial.

Second. For misconduct of the United States district attorney, which prejudiced the rights of these defendants committed during the progress of said trial, as follows:

That this trial began on Thursday, the 2nd day of January, 1913, after the court had announced in denying the application of the defendants for a postponement, that the trial would be pro-
531 ceeded with, and after the Government testimony had been introduced, a recess of the trial would be taken to await the arrival of the witnesses for the defense from Seattle and Portland; that the jury were selected, impaneled, and sworn, and the Government case in chief concluded about noon of January 6th, whereupon defendants request the further trial of the cause postponed until the following Friday, January 10th, 1913;

That at the beginning of the trial the United States district attorney suggested, in the presence of some of the jury, that the court permit said jury to separate during the progress of said trial

at each adjournment of the court and until the case should finally be submitted to them upon the instruction of the court;

That the court asked the defendants' counsel, the defendants being present in the court, if he consented thereto, and such consent was then and there given;

That thereafter and until the case was finally given to the jury at each adjournment, at noon and at evening, and from January 6th, 1913, to January 10th, 1913, the jury were permitted to separate and were at liberty to go about their usual avocations; that thereafter and on Tuesday, January 7th, the United States district attorney, for the purpose and with the intent, as the defendants believe and allege, did prejudice their case, to secure their conviction in an illegal manner, gave out and caused to be published in the Daily Alaska Dispatch, a newspaper of general circulation, published in Juneau, Alaska, where the trial was being held, an article entitled, "Japanese are accused of many crimes." A copy of said interview cut from the newspaper named, issued on said January 7th, 1913, is hereto attached and made a part thereof:

532 That said newspaper appeared and was circulated generally in the town of Juneau, Alaska, on the evening of January 7th, 1913.

Third. The court erred in not granting the motion of the defendants made on January 10th, 1913, to discharge the jury from the consideration of this cause for the reasons in said motions set forth.

Fourth. The court further erred then and there, calling the attention of the jury to said article above mentioned published January 7th, 1913, and asking them if they had read the same, and if so to raise their hands; no juror responding to said request.

Fifth. The court erred in admitting in evidence over the objection of the defendants, the purported statement made by the defendant, Fushimi, to the District Attorney, for the reason in said objection set forth.

Sixth. The court erred in permitting the plaintiffs to reopen the case for the Government after they had rested and introduced for the testimony.

Seventh. The verdict of the jury is contrary to the laws and contrary to the instruction of the court in this, the verdict is against the defendant, Itow, for murder in the first degree, and against the defendant, Fushimi, for manslaughter, but under the theory of the case and the evidence for the Government, if either of the defendants were guilty at all of any degree of homicide, they were both equally guilty, or equally innocent, and the verdict furnished conclusive evidence that the jury disregarded the law and arbitrarily decided upon the case, either without adequately comprehending the real issues involved and the law applicable thereto as given by the court, or acted in a wanton disregard thereof.

Eighth. The court further erred in compelling the defendants to go to trial until the arrival of the witnesses for the defense, and the defendants' counsel had had a reasonable opportunity

to see said witnesses and ascertain in detail the facts to which they would testify in this, that the defendants were thereby deprived of a valuable right secured to them by law, namely to have their counsel make an opening statement to the jury based upon the evidence to be produced, which it was impossible for their counsel to do at the said time and under said circumstances.

Ninth.—The court erred in refusing certain instructions requested in writing by the defendants and to the refusing of which exceptions were duly preserved. The affidavit of J. H. Cobb in support of the 1st, 2nd, 3rd, 4th, & 8th grounds is hereto attached.

J. H. COBB,

Attorney for Defendants.

AFFIDAVIT OF J. H. COBB IN SUPPORT OF THE MOTION FOR NEW TRIAL.

In the District Court for Alaska, Division No. One, at Juneau.

UNITED STATES OF AMERICA, PLAINTIFF, }

vs.

O. ITOW AND E. FUSHIMI, DEFENDANTS. }

UNITED STATES OF AMERICA,

Territory of Alaska, ss:

J. H. Cobb, being first duly sworn, on oath deposes and says: I am attorney for the defendants in the above-entitled cause. The indictment herein was returned on the 13th day of December, 1912, while I was absent from the Territory of Alaska, in Seattle. Upon my return about the 16th of December, I communicated with the
534 defendants through an interpreter as best I could, but I found it impossible to learn from any of them any facts concerning the transaction other than that those they testified to on the trial or any of the surrounding circumstances of which they appeared to be, and I believe were, ignorant. They did, however, give me the names of these witnesses for whom process was applied for on their behalf on December 20th, 1912, as witnesses who were in a position to know the surrounding facts. I thereupon applied for said process, which was granted. I then asked that the case be set down for trial not earlier than January 15th, 1913, so as to have an opportunity of seeing said witnesses and preparing for the trial. This application was opposed by the United States district attorney and in the case was set for trial for January 2nd, 1913. I requested the marshal to telegraph the process for the witnesses, which was done; and I did all in my power to get said witnesses here as early as possible. Said witnesses did not reach Juneau until the afternoon of January 9th, 1913, and until about three days after the Government's case in chief had closed. I did not make any opening statement to the jury because I felt I could not do so in justice to the defendants, the court, or myself in view of the want of an adequate opportunity to talk

with the witnesses and ascertain in detail the facts to which they would testify.

In more than twenty-five years' practice at the bar I have never had to go to trial with so little opportunity for preparation. I have resided in Juneau many years and know the Daily Alaska Dispatch. It is a newspaper of general circulation in and around Juneau and is the oldest newspaper published in said town.

J. H. Conn.

535 Subscribed and sworn to before me this the 14th day of January, 1913.

[SEAL.]

E. W. PETTIT,
*Clerk of the District Court,
Dist. of Alaska Division, No. 1.*

JAPANESE ARE ACCUSED OF MANY CRIMES.

Federal official tells of cannery condition. Many crimes committed by alien labor employed in canneries which is not reported to courts.

"It is *is* not at all unlikely that there are more murders committed among the canneries of southesastern Alaska, than we have any idea," said United States District Attorney John Rustgard this morning. "There is no question but that among the orientals employed in the canneries the fixed idea prevails that any attempt on the part of one of their workers to abonded his employment is an offense which should be punishable with death."

Last year at the Weiss cannery near Shakan, a Corean threatened to leave the cannery. He was an oriental of unusual intelligence and education, and could talk in four languages. He had adopted the ways of civilization, and the constant diet of unsalted rice was more than he could endure. He attempted to escape, but was caught. He was murdered, and eight Japanese took part in the crime. His skull was crushed in with a rock, a pistol bullett was fired through his neck, a stone was tied to his body, and he was thrown into the bay.

Had not the sea given up its dead, it is practically certain
536 that the crime would never have been known. But six weeks or two months afterward the body floated. The cannery officials claimed, and the claim was doubtless a truthful one, that he had never been missed by them and they knew nothing of his murder.

After an investigation by the prosecuting attorney's office, they were morally certain of the conspiracy, and the reason the murder was committed, but there was a failure of conclusive evidence, and so when one of the Japanese offered to plead guilty to manslaughter on condition that the other cases should be dismissed, the offer was accepted. Afterward the full story of the murder was obtained. The eight Japanese had committed the crime, but the one who con-

fessed had been selected by the lot to plead guilty on the condition that the others be freed.

When a statement was taken by representatives of the prosecuting attorney's office, in the Itow case of the bookkeeper of the cannery, a Japanese, he was asked if he had not himself shot Frank Dunn, about a week before the tragedy, for which Itow and Fushimi are being tried. He said that he had not. He was then asked if once, when Dunn had claimed to be sick, he had not gone to his room to get him to go to work, because the cannery needed his service, he had not ended by shooting at Dunn.

"Oh! Oh!" said the bookkeeper, with a gesture of impatience, "Really I had forgotten it." But he insisted that he had not intended to shoot him, but merely to frighten him.

For a long time, refugees from canneries coming in Juneau have claimed not only that they were held as slaves but that they were virtually shanghaied at San Francisco and Seattle. Although it is true that most of the unfortunates are either orientals or Mexicans, or in a few cases Spaniards, it is undoubtedly true that there were

537 other American boys, like Frank Dunn, who, finding themselves impoverished in a strange city, have become victims of the system. And as these would find it more difficult than the others to endure the fare, it is probable that many victims buried beneath the waters of the sound and straits of the inside passage were born on American soil.

538 AFFIDAVIT IN OPPOSITION TO MOTION FOR A NEW TRIAL.

In the United States District Court for the District of Alaska,
Division Number One.

UNITED STATES OF AMERICA	} No. 863-B.
<i>v.</i>	
O. ITOW AND E. FUSHIMI.	

UNITED STATES OF AMERICA,
District of Alaska, ss:

John Rustgard being first duly sworn deposes and says that he is the United States attorney for division Number One, District of Alaska, and the one who, associated with H. H. Folsom, assistant United States attorney for said district and division, appeared for plaintiff in the above-entitled cause on the trial thereof.

That the statement of J. H. Cobb, attorney for the defendants, in his motion for a new trial, to the effect that at the beginning of the trial of the above-entitled cause the United States attorney suggested in the presence of some of the jury that the court permit said jury to separate during the progress of said trial at each adjournment of the court, and until the case should finally be submitted to them upon the instruction of the court, is false, in this, that no such suggestion was made by either of the attorneys for the Government or the

defense in the hearing of any of the jurors, but that, on the contrary, it was agreed between the said J. H. Cobb and this deponent, as representing the respective parties in the above-entitled cause
539 that there would be no objection made to allowing the jury to separate. That this agreement was made because it was considered less difficult to get good, substantial, and intelligent business men on the jury where it became known that they would not have to be kept away from their business and their families during the entire time of the trial. That after the said petit jury was impanelled it was found that almost the entire panel consisted of substantial and intelligent business men, well known to both J. H. Cobb and this deponent to be such men as could not be approached or in any way influenced by unlawful means during the trial; that after the jurors were accepted the court instructed the jury very carefully as to their duties, to refrain from discussing the case or any facts pertaining thereto with any person whatsoever and instructed them further not to read any newspapers which might contain either an account of the trial or other matters touching any phase of the case until their verdict was rendered. And deponent verily believes that each individual juror strictly obeyed the instructions of the court in that behalf and conducted himself with the utmost circumspection, and which opinion this deponent firmly believes is shared in by the attorney for the defendants.

That the following statement, set out in the said motion of J. H. Cobb, is also false, to wit: "That thereafter and on Tuesday, January 7th, the United States district attorney for the purpose and with the intent, as the defendants believe and allege, to prejudice their case and to secure their conviction in an illegal manner, gave out
540 and caused to be published in the Daily Alaska Dispatch, a

newspaper of general circulation, published in Juneau, Alaska, where the trial was being held, an article entitled 'Japanese are accused of many crimes.'" That the facts with reference to said article are as follows: On or about the 6th day of January this deponent had a general conversation with one A. H. Callaham, who was at that time and now is connected with the publication of the Daily Alaska Dispatch; that that conversation touched a multitude of questions, no part of which was ever intended for publication, and this deponent had no intimation that the said Callaham intended at that time to make use of any statements made by this deponent at that time, but that, on the contrary, this deponent at that time and prior thereto had very frequently admonished the said Callaham and other representatives of the press not to make any statements in the columns of their respective papers with reference to any case on trial or any case to be tried more than the formal announcement that indictments had been found, and the cases would be tried; and this deponent on such occasions explained that such publication touching the facts in any such cases might be prejudicial, both to the Government and to the defendants, and might render it very difficult to secure jurors.

That deponent admits that he made the statements attributed to him in quotation in the article referred to in the affidavit of J. H. Cobb, but denies that the same were intended for publication.

That after the publication of said article the attorney for the defendants, in the absence of the jury, submitted the same to the court and asked that a new trial be granted forthwith, and at that time this deponent explained to the court the conditions and
541 circumstances under which the statement by deponent had been made, as above set out, and the next morning the said Daily Alaska Dispatch confirmed the statement of this deponent as true; that after the said motion had been submitted to the court the jury were called into the court room, at which time the court asked the jurors if any of them had seen an article in the Daily Alaska Dispatch entitled "Japanese are accused of many crimes," or any other article touching such subject, and the various jurors indicated that they were absolutely ignorant of such publication.

Deponent further alleges that the said defendants have had ample time to prepare for the trial in the above entitled cause, that the hearing of the said Itow was had before the commissioner, Grover C. Winn, at Juneau, on the 18th day of July, 1912, at which time the said J. H. Cobb appeared for the said defendant Itow and at which time the said Itow was bound over to the district court to await the action of the grand jury, and at the said hearing the said Cobb as well as the said Itow became fully informed of what the charge against the said defendant was and that an indictment of the said Itow would be practically certain and inevitable; that the grand jury convened on the 9th day of last December, for which time the witnesses on behalf of the Government were subpoenaed to be present at court, and that on the 13th of last December an indictment was duly found, filed, and returned against each of the said defendants, and on which day they were duly arraigned, and on the next day, the 14th of December, entered a plea of not guilty. That, notwithstanding said facts no application for a continuance or postponement
542 was made in said cause until the 2nd day of January, 1913, but that meanwhile and on the 20th day of December, 1912, the said defendants, through their attorney, J. H. Cobb, applied to the court for an order to have witnesses subpoenaed, at the expense of the Government, on behalf of the defendants, from the States of Washington and Oregon. That deponent verily believes that the reason said request for said order was not presented at an earlier date was due to the fact that the attorney for the defendants desired to have the case continued over the term; that at the time the motion to secure said witnesses was granted, to wit, on the 20th of December, the case was set for trial the 2nd of January.

To evidence the fact that the defendant Itow expected to be indicted and to have his trial at the early part of the term deponent desires to call attention to the fact that one Kinya Okajima, a highly intelligent and educated Japanese from Seattle, arrived at Juneau at

or prior to the 9th of December, 1912, at the behest and expense of said Itow or his friends in order to assist in the defense of said Itow. And deponent verily believes that there was no reason or excuse why the defendants' witnesses should not have been subpoenaed in due time and been here ready for the trial prior to January 2, 1913. Deponent is informed and verily believes that the said defendants were not in need of the necessary means with which to secure the attendance of witnesses and deponent is informed and verily believes that the said J. H. Cobb has received a fee of fifteen hundred dollars for their defense, not counting the fee received by the said Kinya Okajima, which deponent believes to be the sum of ten dollars per day and expense from Seattle to Juneau and return.

543 No copy of the defendants' motion for a new trial nor of the affidavit thereto attached has ever been served upon deponent in the above-entitled cause.

JOHN RUSTGARD.

Subscribed and sworn to before me this 3rd day of February, A. D. 1913.

[NOTARIAL SEAL.]

INA S. LIEBHARDT,

Notary Public in and for the District of Alaska.

AFFIDAVIT IN OPPOSITION TO MOTION FOR A NEW TRIAL.

In the United States District Court for the District of Alaska, Division Number One.

UNITED STATES OF AMERICA	} No. 863-B.
<i>v.</i>	
O. ITOW AND E. FUSHIMI.	

UNITED STATES OF AMERICA,
District of Alaska, ss:

A. B. Callahan, being first duly sworn, deposes and says, that he is and for the last several months has been employed as a writer on the Alaska Daily Dispatch and that he was the writer of the article credited to the said Alaska Daily Dispatch and referred to by J. H. Cobb in his affidavit filed herein; that deponent further says that during the period when the said case was on trial he had an informal conversation with the United States district attorney, John Rustgard, in relation to the labor conditions of the canneries of
544 southeastern Alaska; that deponent well knew that no part of such conversation was intended for publication; that said deponent has been frequently asked by the said United District Attorney Rustgard not to comment on cases on trial before the court nor on cases about to be tried prior to trial; that some hours following the conversation with United States District Attorney Rustgard hereinbefore referred to this deponent, being very well acquainted with the jurors in said case and confident, on account of the character

of said jurors, that there was no danger of said jurors reading the newspapers during the trial or of their being influenced thereby, did on his own responsibility have printed the articles herein referred to and did so without the knowledge of the said United States District Attorney Rustgard and although he, said deponent, well knew that the statements quoted as having been made by the said United States District Attorney Rustgard were not intended for publication.

A. B. CALLAHAM.

Subscribed and sworn to before me, this 3rd day of February, A. D. 1913.

[NOTARIAL SEAL.]

INA S. LIEBHARDT,

Notary Public in and for the District of Alaska.

(Endorsed:) Filed Feb. 3, 1913. E. W. Pettit, clerk. By H. Malone, deputy. Copy No. 863-B. In the District Court of the United States, District of Alaska, Division Number One. United States of America vs. O. Itow and E. Fushimi. Affidavits in opposition to motion for a new trial.

545 The foregoing affidavits in support of and in opposition to the motion for a new trial having been read to the court and duly considered, said motion was on the 10th day of February, 1913, duly denied, to which ruling the defendants then and there excepted.

546 And because the above matters do not appear of record, I, Peter D. Overfield, the judge before whom said cause was tried, do hereby certify that the above and foregoing bill of exceptions contains a full, true, and complete transcript of the evidence produced on the trial of said cause, excepting exhibits offered, to wit: Plaintiffs' Exhibits 1-A, 1-B, 2, 3, 4, and defendants' Exhibit A; and it is further ordered that the original of the plaintiff's Exhibits 1-A, 2-B, 2, and defendants' Exhibit A, be sent up as a part of the record herein; I do hereby allow and approve the above and foregoing as a correct bill of exceptions herein, and order the same to be made a part of the record.

Done in open court on this, the 12th day of June, 1913, during the term at which the trial took place and within the time allowed by the orders and rules of the court.

PETER D. OVERFIELD, *Judge.*

(Endorsed:) In the District Court for the District of Alaska Division No. 1. United States vs. O. Itow and E. Fushimi. Bill of exceptions filed Jun. 12, 1913. E. W. Pettit, clerk. By H. Malone, deputy. U. S. vs. O. Itow & E. Fushimi, 863-B.

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PRECIPUE FOR TRANSCRIPT.

In the District Court for Alaska, Division No. One, at Juneau.

UNITED STATES OF AMERICA, PLAINTIFFS, }
 v. }
 O. ITOW AND E. FUSHIMI, DEFENDANTS. }

To the clerk of the above-entitled court:

You will please prepare and forward to the clerk of the Supreme Court in Washington, D. C., a transcript of the record in the above-entitled cause, and include in such transcript the following papers, etc.:

- I. Indictment.
- II. Arraignment.
- III. Pleas.
- IV. Trials.
- V. Verdict.
- VI. Sentences.
- VII. Order extending time to settle bill of exceptions.
- VIII. Assignments of error.
- IX. Petition for writ of error.
- X. Order allowing petition for writ of error.
- XI. Citation.
- XII. Orders, Feb. 24th, Mar. 4th, Apr. 23rd, and May 31st.
- XIII. Bill of exceptions.
- XIV. This præcipe.

Said transcript to be prepared in accordance with the rules of this court and of the Supreme Court of the United States.

J. H. COBB,

Attorney for Defendants and Plaintiffs in Error.

(Endorsed:) Filed in the District Court, District of Alaska, first division, July 15, 1913. E. W. Pettit, clerk, by H. Malone, 548 deputy. In the District Court for Alaska, Division No. One, at Juneau. United States of America, plaintiffs, vs. O. Itow and E. Fushimi, defendants. Præcipe for transcript.

549

ORDER.

UNITED STATES }
 v. }
 O. ITOW AND E. FUSHIMI. }

It appearing to the court that this is a capital case and under the law the defendants are entitled to have the record sent up on their writ of error at the expense of the Government.

It is ordered that the clerk transcribe said record for the return to the writ of error and perform such other services as are proper and

185

necessary in this case at the expense of the Government of the United States.

Done in open court this the 23rd day of July, 1913.

FRED M. BROWN, *Judge.*

(Endorsed:) Filed in the District Court, District of Alaska, First Division, July 23, 1913. E. W. Pettit, clerk, by C. Z. Denny, deputy.

550

ORDER.

In the District Court for the District of Alaska, Division No. 1, at Juneau.

UNITED STATES	} No. 863-B.
<i>v.</i>	
O. ITOW AND E. FUSHIMI.	

It appearing to the court that, owing to the press of other business the clerk has been unable to complete the transcript of the record in this case so as to have the same in the clerk's office of the Supreme Court in Washington on or before the first day of August, 1913,

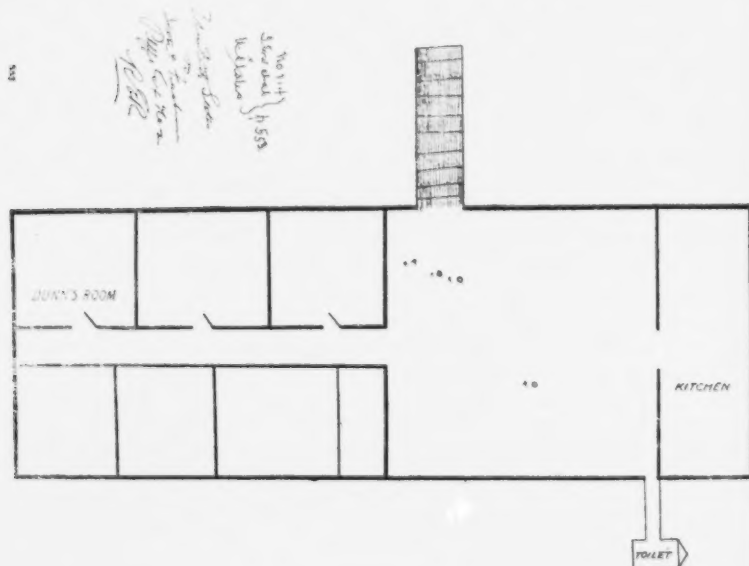
It is ordered that the time for making return to the writ or error herein be now further extended to the 1st day of September, 1913.

Done in open court this 31st day of July, 1913.

FRED M. BROWN, *Judge.*

(Endorsed:) Filed in the District Court, District of Alaska, First Division, Jul. 31, 1913. E. W. Pettit, clerk.

* * * * *



555

CERTIFICATE.

In the District Court for the District of Alaska, Division Number One, at Juneau.

THE UNITED STATES OF AMERICA	}	No. 863-B.
"		
O. ITOW AND E. FUSHIMI.		

I, E. W. Pettit, clerk of the district court for the District of Alaska, Division Number One, do hereby certify that the foregoing and hereto attached five hundred and fifty-four pages of typewritten and other matter, numbered from one to five hundred and fifty-four, both numbers inclusive, constitute a full, true, and correct copy of the record, and the whole thereof prepared in accordance with the precept of plaintiffs in error, filed herein and made a part hereof, including original exhibits of plaintiff "1-A," "1-B," and "2" original exhibit of defendant "A," in cause No. 863-B, entitled The United States of America, plaintiff and defendant in error, vs. O. Itow and E. Fushimi, defendants and plaintiffs in error.

I do further certify that the said record is by virtue of writ of error and citation issued in this cause, and the return thereof in accordance therewith.

I do further certify that the said record has been prepared by me in my office at the expense of the Government of the United States in accordance with order of this court made and entered July 23, 1913.

In witness whereof I have hereunto set my hand and affixed the seal of the above-entitled court this 2d day of August, 1913.

[SEAL.]

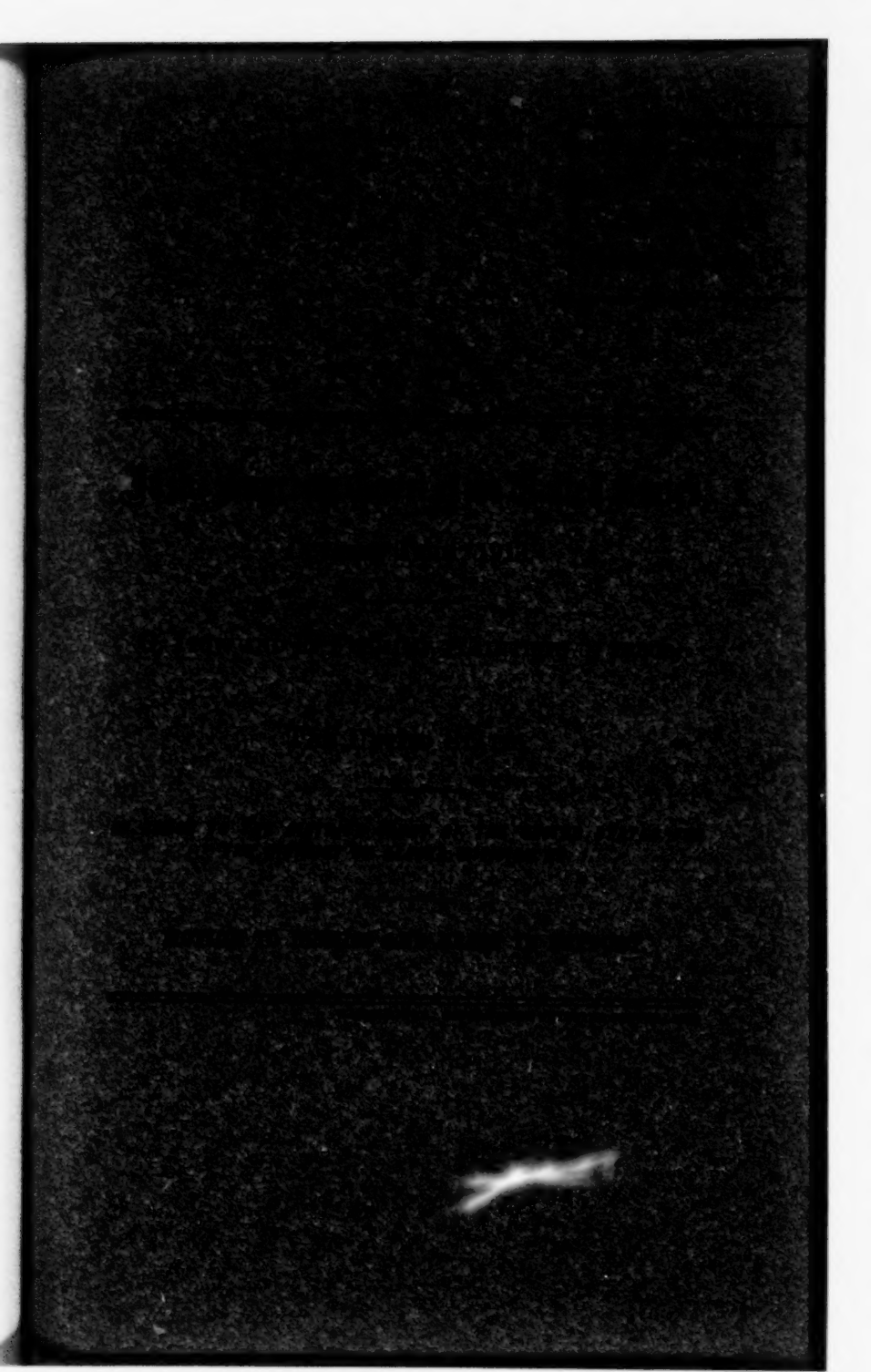
E. W. PETTIT,

*Clerk of the District Court
for the District of Alaska, Division No. 1.*

(Endorsed on back:) File No. 23,865. Alaska Territory, D. C. U. S., Division No. 1. Term No. 714. O. Itow and E. Fushimi, plaintiffs in error, vs. The United States. Filed September 26th, 1913. File No. 23865.







In the Supreme Court of the United States.

OCTOBER TERM, 1913.

O. ITOW AND E. FUSHIMI, PLAINTIFFS IN error, v. THE UNITED STATES.	}	No. 714.
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*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF ALASKA, DIVISION NO. 1.*

MOTION TO DISMISS AND BRIEF IN SUPPORT.

The Solicitor General, on behalf of the United States, moves that this writ of error be dismissed.

The indictment charged murder in the first degree in violation of section 3 of the Alaska Criminal Code. The defendant Itow was found guilty as charged, and was sentenced to death. The defendant Fushimi was found guilty of manslaughter, and sentenced to 20 years' imprisonment.

Error is assigned:

(1) Because the court refused to postpone the time of trial until the arrival of certain witnesses for the defense, and thus to give counsel a reasonable opportunity to prepare for trial.

(2) Because the court permitted the jury to separate at each adjournment. The Alaska Code of Criminal Procedure does not prohibit such separation, and it was allowed with the consent of defendants' counsel (R. 44, 234).

(3) Because the court did not declare a mistrial on account of an alleged interview with the United States Attorney concerning the trial, published in a newspaper while the jury was thus at liberty. The jurors satisfied the court that none of them had read the article (R. 234, 242).

(4) Because the court accepted in evidence a purported confession of defendant Fushimi.

(5) Because of the court's refusal to give certain instructions requested by the defendants relating to burden of proof, reasonable doubt, justifiable homicide, the effect of defendants' testimony (R. 485-486). These requested instructions were substantially covered in the court's charge so far as pertinent to the case (R. 487-529).

(6) On the ground that the verdict of the jury was contrary to law and to the instructions of the court (R. 20-23).

It is difficult to discover on what theory the case was brought here. The jurisdiction of the court below is not questioned. No treaty is involved. Defendant Fushimi was not convicted of a capital offense. *Rakes v. United States*, 212 U.S. 55. And as the crime was committed after sections 134 and 247 of the Judicial Code, transferring jurisdiction of capital cases to the Circuit Court of Appeals for

the 9th Circuit, had gone into effect (R. 1-2), defendant Itow has no right to a review because of his conviction of first-degree murder.

The confession, introduced as an "admission on the part of Fushimi as to certain facts," and not as evidence against Itow (R. 374), was objected to on behalf of Itow as prejudicial, although defendants had not asked for separate trials (R. 374, 376); and on Fushimi's behalf because it was "a privileged communication; was taken when he was asked to make a statement to the District Attorney, and that it can not be used without his consent." No claim was made that it was induced by hope of reward or immunity, threats, duress, or intimidation (R. 373-376). The objection thus presents no question of the prisoner's constitutional immunity from self-incrimination.

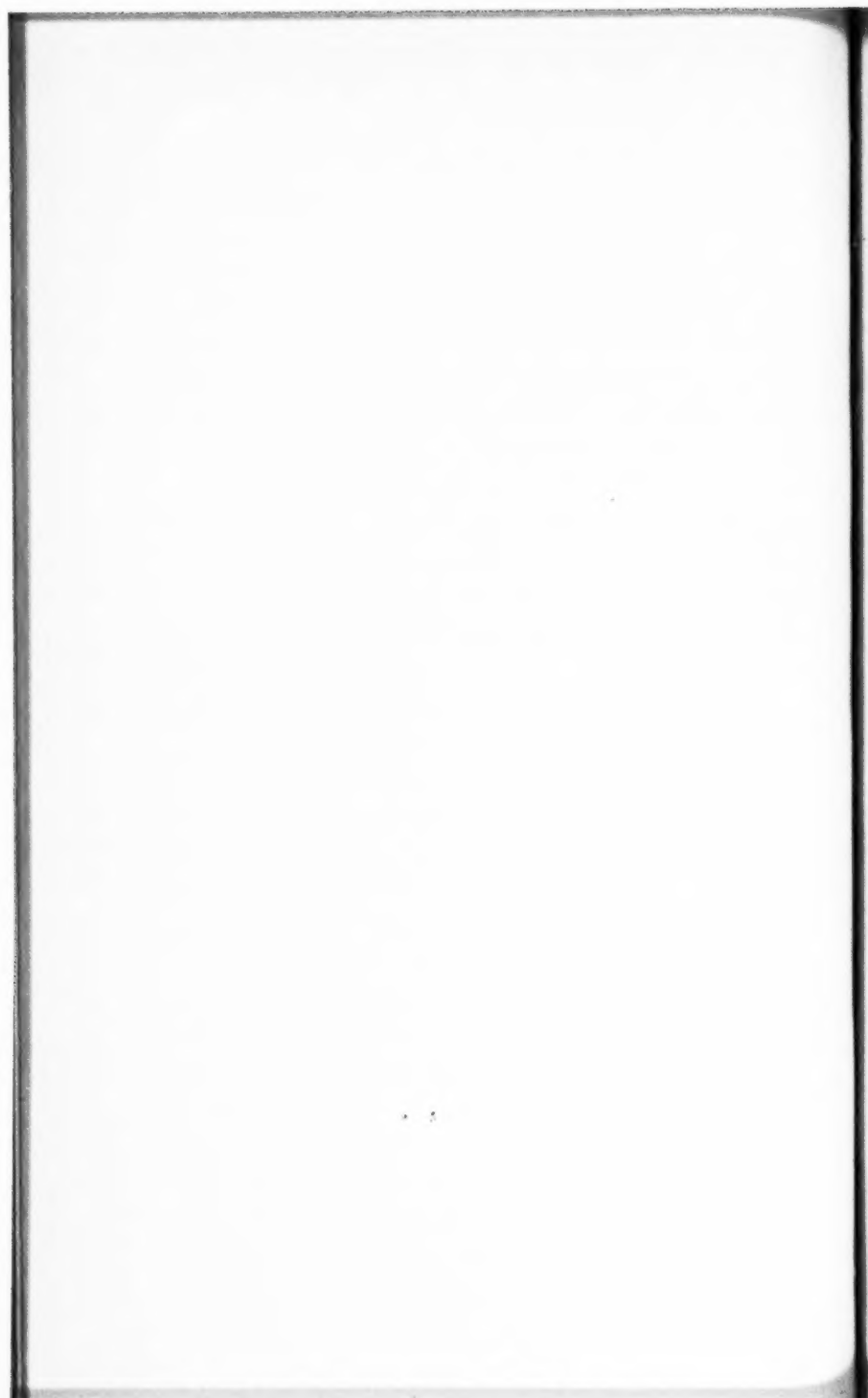
Indeed, none of the exceptions or assignments of error suggests the violation of any constitutional right of defendants. This in itself is sufficient to prevent the consideration of constitutional questions by this court if any were involved. *Ausbro v. United States*, 159 U. S. 695. But in fact there are no such questions in the case.

It follows that this court is without jurisdiction under section 247 of the Judicial Code, and the writ of error should be dismissed.

JOHN W. DAVIS,
Solicitor General.

DECEMBER, 1913.





No. 714.

**In the Supreme Court of the
United States.**

OCTOBER TERM, 1913.

Office Supreme Court, U

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O. ITOW and E. FUSHIMI,

Plaintiffs in Error,

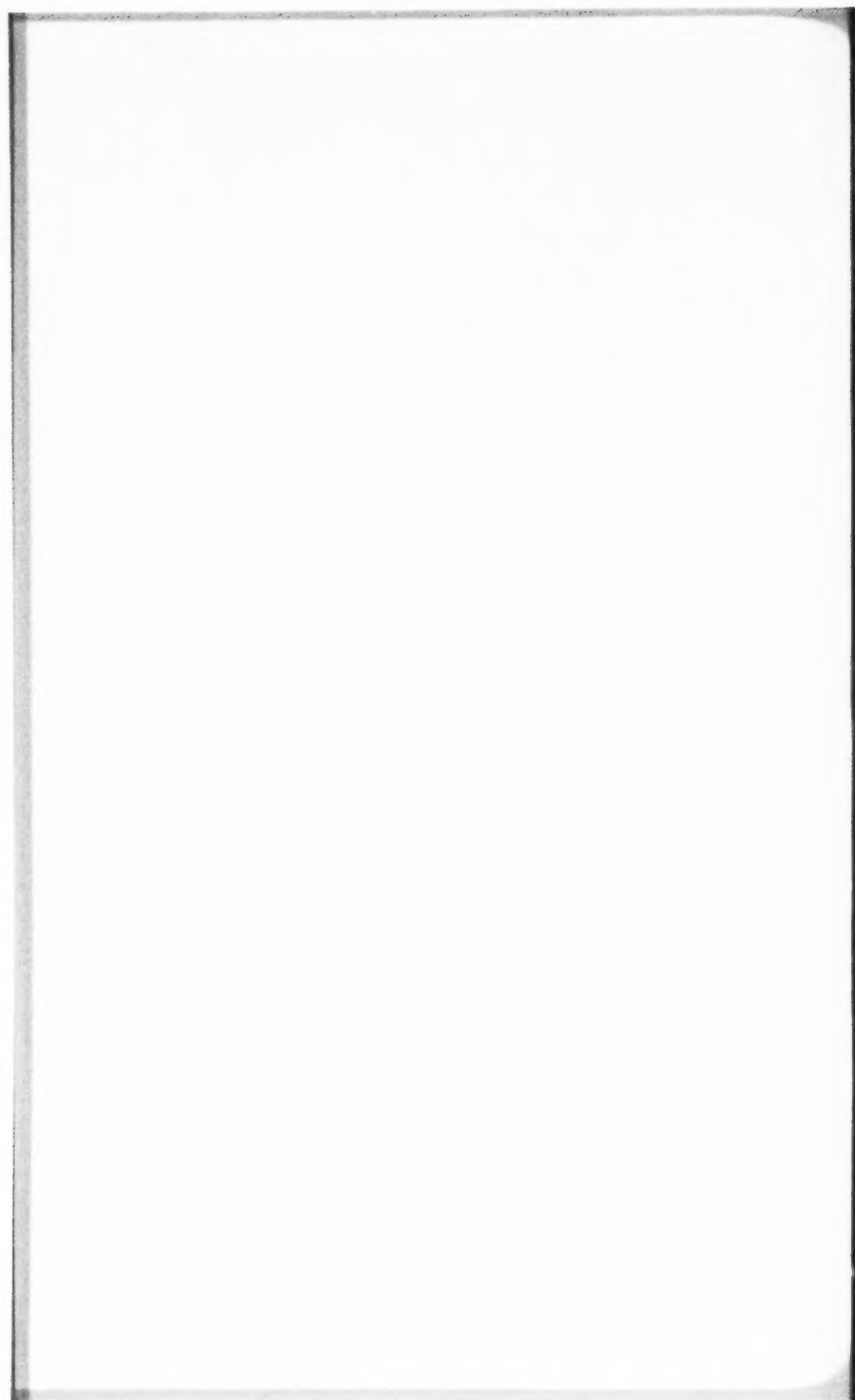
vs.

THE UNITED STATES.

In Error to the District Court of the United States,
Division No. 1, Territory of Alaska.

Brief of Plaintiffs in Error.

J. H. COBB,
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**In the Supreme Court of the
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OCTOBER TERM, 1913.

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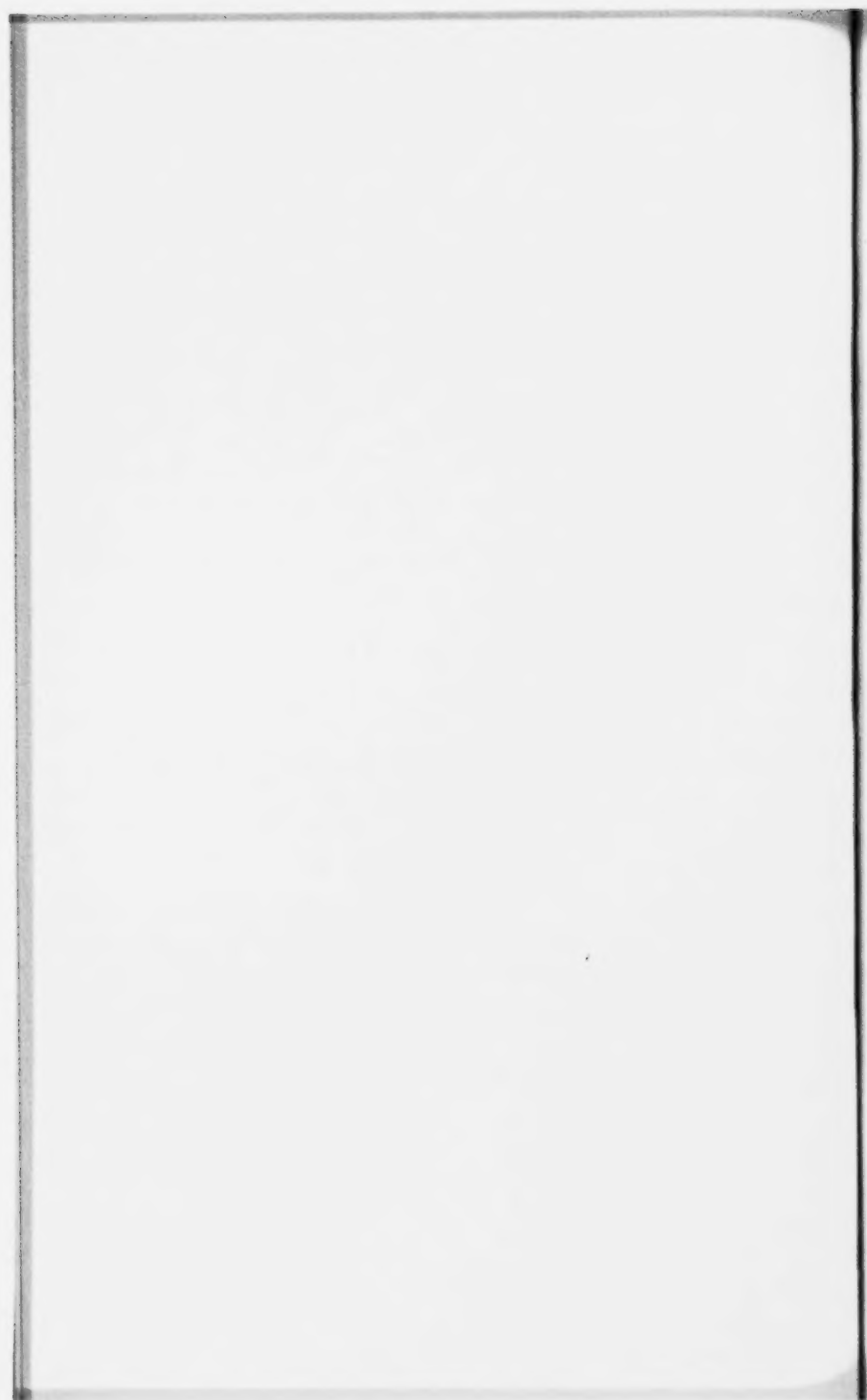
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Plaintiffs in Error,

vs.

THE UNITED STATES.

In Error to the District Court of the United States,
Division No. One, Territory of Alaska.

Brief of Plaintiffs in Error.

STATEMENT OF THE CASE.

The plaintiffs in error, whom we shall hereinafter refer to as the defendants, were indicted in the District Court for Alaska, Division No. One, on December 13, 1912, for the murder of Frank Dunn, alleged to have been committed on July 14, 1912. The defendants were arraigned the same day, their counsel being absent. The next day the Court appointed counsel for them, associate to their employed counsel, and pleas of "not guilty" were entered.

The defendants are Japanese, unable to understand or express themselves in English, except a little "pigeon English" in use among hands around the salmon canneries. They could not communicate with their counsel, or testify, except through an interpreter. The witnesses for the defense, except one, were in the same situation. And these witnesses, at the time of the arraignment and pleas, were in Seattle and Portland, Oregon. Application for process for

the witnesses was made and granted on December 20, 1912 (Rec. 158). On December 14th the case was set for trial to follow the case of the United States vs. Dick Manson. On January 2, 1913, the case was called for trial. Counsel for the defendants, in open court, presented a telegram from the marshal in Portland, to the marshal at Juneau, reading: "Two witnesses leave for Seattle to-night. Washout between here and Seattle. If able to get through will leave Seattle Tuesday, thirty-first, on steamer Northwestern" (Rec. 19), and asked that the trial be postponed till the arrival of these witnesses.

The Government insisted upon an immediate trial, and the Court denied the application, and the defendants excepted. (Rec. 19, 20.) Upon receipt of a telegram later in the day notifying defendants' counsel that the witnesses for the defense were all on the S. S. "Dolphin," application was made to the Court to postpone the trial till the arrival of the "Dolphin." The application was denied.

The trial began on January 2, 1913. The jury was secured on the 2d and 3d, and the prosecution made the opening statement. Counsel for the defendants was unable to make any opening statement, because he had had no opportunity to see and talk with the witnesses for the defense. The taking of testimony began on January 4th. (Rec. 5, 6.) The Government closed its case in chief on January 6th. (Rec. 6.) On that date none of the witnesses for the defense had arrived in Juneau, although they were known to be on the S. S. "Dolphin" en route from

Seattle, and the case was continued until the 8th. (Rec. 6.) On the 8th, the "Dolphin" not having arrived, the case was further continued until the 10th.

In the meantime, and at each adjournment, the jury was suffered to separate and go at large about their several vocations, in and around the town. (Rec. 24.) In the meantime, on January 7th, knowing the jury were so at large, the District Attorney gave out an interview to one of the local daily papers, which had a tendency to inflame the entire community, where the jury was at large, against the defendants and their race.

On January 10th, defendants moved the Court to discharge the jury from further consideration of the case, on the ground of improper influence on the jury from the publication of such interview. (Rec. 71-75.) The Court called the jury into the box, and without swearing them, put to the panel the question whether any one of them had read the article entitled "Japanese Accused of Many Crimes," and requested that if anyone had, to hold up his hand. None of the jurors responded, and the Court denied the motion, and the defendants excepted. (Rec. 74, 75.)

Defendants called as their first witness one Ohta, a Japanese. On his cross-examination the Government asked and obtained leave to reopen the case, and introduced in evidence, over defendants' objection, an alleged confession of the defendant, Fushimi, alleged to have been made in response to question in the District Attorney's office on December 10, 1913. (Rec. 75-113.)

The trial resulted in a conviction of Itow of mur-

der in the first degree, and he was sentenced to hang. Fushimi was convicted of manslaughter, and sentenced to twenty years in the Penitentiary, and the case was brought to this court by writ of error.

The errors relied upon for a reversal are,—

First: Abuse of discretion of the trial Court which prevented the defendants having a fair trial.

Second: Error of the Court in permitting the jury, after they were selected, impaneled, and sworn, to separate and mingle with the community at large.

Third: Error of the Court in admitting in evidence the alleged confession of Fushimi.

These points are raised on the first four assignments of error, which are as follows:

“First: The Court erred in refusing the application of the defendants to postpone the trial of this case until January 15, 1913, and until the arrival in Juneau, Alaska, of the witnesses for the defense, and a reasonable time and opportunity for the defendants’ counsel to see said witnesses and make reasonable preparation for trial; and in compelling defendants to go to trial January 2, 1913, before the arrival of said witnesses, and thereby in effect denying to defendants the right to have their counsel make an opening statement to the jury; and in denying the motion for a new trial, based upon this ground.

“Second: The Court erred in not discharging the trial jury and entering a mistrial, upon the request and motion of the defendants, for the

reasons stated in said motion, viz.: That the jury, having been selected, impaneled, and sworn, were allowed to separate on each adjournment or recess of the Court, and go at liberty about the town of Juneau; that on January 7th, while the jury were so separated and at liberty, the District Attorney gave out an interview to a newspaper reporter, which was published in Juneau on said date, an article entitled, 'Japanese are Accused of Many Crimes,' and in refusing to grant a new trial on this ground assigned in said motion, a copy of said article being attached to such motion.

"Third: The Court erred in permitting the jury, after they were selected, impaneled, and sworn, to separate and go about their several vocations at each adjournment or recess of the court until the case was finally given to the jury.

"Fourth: The Court erred in overruling the objections of the defendants to the purported confession or admission of the defendant, Fushimi, made before the District Attorney, and permitting the same to be read in evidence to the jury."

ARGUMENT.

First: The Court should bear in mind that the defendants are Japanese fishermen, unable to speak the English language, so as to communicate with their counsel, except through an interpreter; that all the witnesses, except three or four of those of the Government, were in like case. The witnesses for the defense were all in Portland, Oregon, or Seattle.

Before these witnesses could possibly be procured in Juneau, and the defendants' counsel have an opportunity to prepare the defense, or acquire sufficient information to intelligently advise the defendants, or intelligently cross-examine the Government witnesses, the case was forced to trial. The defense was precluded from making an opening statement to the jury. True, the opportunity was given, but under such circumstances that the right was robbed of all its efficacy—a barren right, because the District Attorney and the Court must have known that counsel for the defense would not exercise such right on the only terms upon which it was granted. But this was not all. The Court, in the exercise of a claimed discretion, allowed the jury to go at large, after being admonished. The jury were separated and going about the town from January 6th to the 10th. On the 7th the District Attorney gave out the interview to the local press, which appears in the record at pages 178–80. It is almost beyond a doubt that some, if not all, the jury read this article. Its publication by the District Attorney at this time could have had no other purpose than that they should see it. When the defendants' counsel called the Court's attention to the matter, the Court did not require the jurors to answer separately under oath whether they had read the article. They were in fact not required to answer at all. Their attention was called to the article, and they were requested that if they had read the article to hold up their hands. No juror responded, and the Court immediately ordered the case to proceed.

We believe the conduct of this trial to be without a precedent among adjudged cases. Certainly counsel for the defendants has been unable to find any. The defendants were entitled to a "fair and impartial trial." If it be possible to deny this right by abuse of discretion in the conduct of the trial it was done in this case.

Second: The Government was bound to give the defendants a trial by jury. This meant the historic jury trial of the common law, as guaranteed by the sixth amendment to the Constitution. The Court claimed a discretion to permit the jury to separate after they had been impaneled and sworn, and before the case was finally submitted; that is, while they were hearing the evidence. This discretion was claimed under the Alaska Statute, copied from the Oregon Code, and such is the construction it has received from the Courts of Oregon. But any statute of the United States which deprives the accused of a trial by jury, as such trial was known at the common law, is void.

Rasmussen vs. United States, 197 U. S. 516.

What was the trial by jury at the common law?

"In all trials for felony, it was necessary at common law, to keep the jury together in charge of an officer, and not to permit them to separate from the time of their being impaneled and sworn."

12 Cyc., p. 671, citing 1 Chitt. Cr. Law, 628.

"In many jurisdictions it has been held that when a rule of practice or statutory provision required that the jury shall be kept together,

defendant cannot waive his rights in this respect, particularly in the case of capital felonies by requesting or consenting to a separation, since defendant ought not to be placed in the position of having to consent or perhaps prejudice the jury by withholding consent."

12 Cyc. 672.

In any event, "defendant's counsel cannot give consent." *Ib.*

See, also, Thompson on Trials, 2d ed., Vol. 2, pp. 2548-49.

Third: The Court erred in admitting in evidence the so-called confession of defendant, Fushimi. (Rec. 101-113.) The District Attorney stated at first that the confession was not evidence against Itow. (Near top page 100.) He then offered it against both defendants, on the theory that a conspiracy had been shown to exist between the defendants to commit the crime with which they stood charged. (Rec. 100, 101.) The Court overruled the defendants' objections and the document went in evidence and defendants excepted. (Rec. 101.)

If any conspiracy existed, it was consummated on July 14, 1912. The statement in question was made in the District Attorney's office December 10, 1912. Consequently it could not have been made in furtherance of the objects of the conspiracy, or even during its existence. It was therefore not admissible.

Wharton, *Crim. Ev.*, 9th ed., sec. 699.

People vs. Martin, 47 Cal. 114.

Besides the communication to the District Attorney made by Fushimi seems to have been privileged, and not subject to use without his consent.

Wharton Crim. Ev., 9th ed., sec. 512.

Oliver vs. Pote, 43 Ind. 132.

It has been necessary to prepare this brief in the greatest haste, and it is therefore limited to a bare outline of the most salient points raised, without extended comment or lengthy citation of authorities. It is hoped and intended to supplement it with an oral argument. But, in any event, we think enough has been said to show that the judgment should be reversed.

Respectfully submitted,

J. H. COBB,

Attorney for Plaintiffs in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

O. ITOW AND E. FUSHIMI, PLAINTIFFS	} No. 714.
in error,	
v.	
THE UNITED STATES.	

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF ALASKA, DIVISION NO. 1.*

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case was brought before this court in December of the present term by motion on the part of the United States to dismiss for want of jurisdiction. The determination of this motion was postponed until the hearing on the merits and the case was placed upon the summary docket.

Plaintiffs in error were indicted on December 13, 1912, for murdering one Frank Dunn. Itow was convicted of murder in the first degree and sentenced to death. Fushimi was convicted of manslaughter and sentenced to 20 years' imprisonment in the United States penitentiary at McNeil's Island. (Rec., 1, 9-11.)

Itow was the Japanese foreman of a gang of Japanese, Mexican, and Porto Rican laborers employed under contract in a cannery at Dundas Bay, Alaska. Among the employees in this gang was one American, the deceased. The men under Itow were employed for the cannery by a Japanese contractor and put in Itow's charge. They were obtained in the United States, transported from Seattle to Alaska, paid about \$140 for the season at the close of their term of employment, and in the meantime money and goods were advanced to them. If any of them left their employment before the end of the season, Itow was obliged to make good the advances thus made to the deserting employee. Dunn, the deceased, had received \$30 advance money and some stuff in addition (29, 44, 135-137, 151-152).

There were also a number of Chinamen employed at the cannery, under the charge of a Chinese foreman. These Chinamen, together with the Mexicans and Frank Dunn, ate and slept in a building known as the "China House." The Japanese occupied a separate building. Dunn roomed with seven other laborers, Mexican and Porto Rican (30, 47-48). (A plat of the "China House" is shown at page 186 of the Record.) The above facts are undisputed.

On July 14, 1912, between 10 and 12 o'clock at night, Frank Dunn was killed in front of the "China House" by a sword in the hands of Itow.

According to the Government's witnesses, Itow and Fushimi (the latter one of the Japanese laborers)

had been looking for Dunn for several hours, Fushimi stating that Dunn was trying to get away from them, and that if they caught him they would kill him (56, 63, 66). Admittedly Itow had been drinking freely, and was somewhat drunk at the time of the killing (115, 119, 127, 141). One of the Government's witnesses had met him in the "Indian Town" near the cannery, and Itow had taken a revolver from his pocket and pointed it at the witness (49). He was then induced to go home by Fushimi, who realized his condition (50, 115, 127).

Shortly after returning from the "Indian Town," Itow and Fushimi went to the "China House," knocked on the door, demanded admission, and asked for Frank Dunn. They were admitted by Dunn, who asked what they wanted. A brief discussion then took place between Itow and Dunn in regard to the latter quitting his employment. The two defendants (according to several witnesses, assisted by a third Japanese, 50, 51), took hold of Dunn and pushed him out of the door. Here the accounts vary. According to the American witnesses outside the "China House," the Japanese rushed Dunn down the inclined gangway which led to the entrance of the house, turned with him to the left, and got him partly down. With Fushimi and the other Japanese holding him down Itow thrust the sword into him (50-51). According to the Mexicans who saw the fracas from within the doorway the Japanese pushed Dunn off the runway; Dunn fell to the ground on the side, and Itow then jumped on top of him and ran

the sword into him (58, 67). The witnesses agree that Dunn was at least part way down when Itow stabbed him with a downward thrust of the sword. Dunn died almost immediately (34-35, 59). He had apparently said or done nothing to incite the attack and had been able to make no effective resistance (51, 58-59, 67).

The Mexican foreman came to the door and asked Itow why he had killed Dunn. Itow, who was then standing on the runway, flourishing the sword and his revolver and defying and threatening those within, replied, "I killed him, and if you don't be careful I will kill you, too," or words to that effect. About that time the Mexicans inside the doorway began to throw cordwood and other missiles at Itow. The latter fired his revolver in the direction of the Mexican foreman. The bullet struck and wounded another Mexican, the witness Castillo.

The witness Nelson, superintendent of the canery, had come up in the meantime, and was shouting to Itow and telling him to come away. Itow paid no attention at first, but after firing the shot above mentioned walked over to Nelson, dropped his sword and pistol in front of him, and gave himself up to his custody (33, 52-53, 60, 68). The superintendent had been notified of the killing by Fushimi (38).

The testimony for the defendants, on the other hand, tended to prove that Itow and Fushimi had been making inquiries after Dunn during the day in order to find him and persuade him not to go away,

as they suspected he meant to do; that after their return from "Indian Town" Fushimi, at Itow's request, went with Nakayama (another Japanese) to the "China House" to lock the door and thus prevent Dunn from escaping; that Dunn objected to this procedure, assaulted Fushimi and Nakayama with his fists, and knocked them off the incline; that Itow, hearing the commotion, took his sword and went to the "China House" to protect his men and stop the fight; that Dunn was about to strike him, so that he attempted to strike Dunn with the sword in its scabbard; that Dunn seized the scabbard, struck Itow with his other hand, knocked him down from this inclined runway to the ground and leaped or fell on top of him; that in so doing the scabbard came off the sword, of which Itow retained possession, and that Dunn fell upon the point of the sword and was thereby mortally wounded (113-122, 138-145).

Dunn, it was asserted, was under the influence of liquor at the time (122). Itow testified that he was unaware that Dunn had been killed until the next morning at breakfast (147). Itow claimed to be badly shaken and dizzy from the fall (145, 155).

Notwithstanding the fact that he had been looking for Dunn for several hours with a view to "persuading" Dunn to remain at the cannery, yet when he finally found Dunn he concluded not to indulge in moral suasion for fear that would hurt Dunn's feelings, but determined to lock the door of the house (150).

Such is in substance the conflict of evidence which the jury resolved against the defendants. The printed record contains merely enough of the testimony on either side to bring out this conflict, in addition to the portions necessary to present the exceptions on which defendants rely. The testimony of three or four other witnesses for the Government and of the Japanese Nakayama for the defense, none of which has been printed, goes to corroborate these two stories.

The first assignment of error relates to the court's refusal to grant a continuance (12). The indictment had been found December 13, 1912 (1). July 18, 1912, Itow was bound over by the commissioner at Juneau to await the action of the grand jury (182). December 20 the defendants made application for process to compel the attendance of their principal witnesses, Nakayama, Tanamichi, and Oogong, at Government expense, alleging that these witnesses were in Seattle, Wash., and Portland, Oreg. (158-159). The case came on for trial on January 2, 1913 (19). Counsel for the defendants then requested a continuance on the ground that the witnesses had started from Seattle, but had not yet arrived; the court, however, ruled that the jury should be impanelled pending their arrival (19-20). Later that same day counsel stated that the witnesses had missed their steamer but would probably be along on the next steamer. The court again refused the application for a continuance (22-23). The matter came up again the next day after the impanelling

of the jury, when counsel for the defense refused to make an opening statement because he had not yet talked to the absent witnesses, and asked to reserve the privilege until he had seen them. The court did not rule on this request, and it was never renewed (26). Subsequently two continuances, amounting to four days in all, were granted pending the arrival of those witnesses (6-7). The trial went on after their arrival (7). Defendants assign as error the court's original refusal to postpone the trial until January 15 on the ground that counsel was thereby denied a reasonable opportunity to see the witnesses and prepare for trial, and that the court thereby in effect denied "to defendants the right to have their counsel make an opening statement to the jury" (12).

The third assignment of error goes to the court's permitting the jury to separate at each recess of court until the conclusion of the evidence (12). This was done with the express consent of counsel for both sides (24, 28, 71). The court was scrupulously careful to instruct the jury in great detail at each adjournment to avoid discussing the case with anyone or listening to any discussion about it, and directed them to inform the court of any willful attempt to influence them by argument or otherwise (24-28).

The second assignment of error was founded on the court's refusal to discharge the jury and enter a mistrial on defendant's motion because of an article published in a paper in the town of Juneau, where the trial was had, during the trial and while the jury was

at large (12). The article in question quoted a brief statement by the United States attorney in regard to offenses of violence among the orientals employed in the canneries, and then proceeded to comment on the murder of Dunn, and on a similar offense in another cannery (179-180). The United States attorney admitted having talked to the newspaper reporter about the case, but asserted that he did so with no intention or purpose of having his remarks published and, indeed, that he had frequently instructed this very reporter and other representatives of the press not to publish any statements concerning cases on trial or to be tried (73-74, 180-182). His affidavit to this effect is supported by an affidavit of the reporter who published the offending article (183). The court, upon a motion to discharge the jury on this account, called the jury in and, reminding them of his previous request to them to refrain from reading newspapers during the trial unless expurgated of anything relating thereto, asked whether any of them had read the article referred to, which the court described as "an article that was entitled 'Japanese are accused of many crimes' and purported to give a history of general conditions about canneries and incidentally touched upon at least one phase of the present case that we are trying." The court then directed that if any juror had read the article he should let the court know by raising his right hand; and then put the question directly. None of the jurors responded and the court thereupon denied the motion (74-75).

The fourth assignment of error relates to the admission in evidence of a statement made by defendant Fushimi to the district attorney before the indictment was found (12). At the request of the United States attorney the court allowed the Government to reopen its case after some of the defendant's testimony was in (95). The United States attorney thereupon introduced the statement made to him by Fushimi on December 10, 1912 (101). Its introduction was objected to by the defense "on the part of the defendant Fushimi for the reason that it is a privileged communication; was taken when he was asked to make a statement to the district attorney, and that it can not be used without his consent." On the part of Itow it was objected to on the ground "that it is * * * hearsay, and that if the Government intended to use it as a confession or an admission from the codefendant Fushimi that they should have had separate indictments and separate trials and couldn't go in evidence without possibly prejudicing the jury against the defendant Itow" (99-100). The United States attorney then said: "We submit it as a confession or admission on the part of Fushimi as to certain facts. It is true it isn't evidence against Itow, but they are tried together. They did not ask for a separate trial." And again, "I offer it simply as evidence against Fushimi" (100, 101).

The statement in question was made in response to questions of the United States attorney, and through an interpreter. Fushimi had not been sworn (99,

122). The statement was verified at the trial by the interpreter and the stenographer who transcribed it (96-99).

This statement differed in material respects from Fushimi's testimony on the stand (101, 113). For example, Fushimi testified in court that he had gone to the China House in order to lock Dunn in, and that Dunn had then struck him and Nakayama (116-117); while in his previous statement he had asserted that he went there to use the water-closet; that he knocked on the door and Dunn let him in; that Dunn did nothing in his presence before striking Itow; and that the trouble began with Dunn's attack on Itow (102, 112). The principal effect of the alleged confession was to impeach Fushimi's testimony on the stand. Indeed, Fushimi admitted the discrepancy and that he had lied in his statement to the United States attorney, alleging that he did so in order to shield Nakayama, Itow, and himself (122-125). The statement also left the impression that Itow, though attacked first and knocked down by Dunn, had deliberately struck the latter with his sword (104-110).

The court did not specifically instruct the jury that the statement was evidence only against Fushimi, nor was it requested to do so.

The fifth, sixth, and seventh assignments of error relate to alleged refusals by the court to give instructions requested by the defense (12-13). The requested instruction to which the fifth assignment

relates, dealing with the effect of the testimony of defendants in court, was given in substance in the thirty-second and thirty-sixth instructions (174, 175).

The sixth assignment of error is unfounded in point of fact, since the court did not refuse to give the instruction there recited, but gave it verbatim. (Instruction 4, p. 163.)

The seventh assignment of error relates to the court's refusal to instruct the jury that homicide was justifiable when committed to prevent the commission of a felony upon the person of the slayer or upon his servant, or in the lawful attempt to prevent a riot or preserve the peace (13). There was no evidence introduced which tended to raise this defense; the whole theory of the defense was that Dunn was killed unintentionally and by accident as the result of falling on Itow's sword. The court instructed the jury in detail that if they had reasonable doubt as to whether Dunn was thus accidentally killed they should acquit (169-170).

The eighth and last assignment of error apparently goes to the court's refusal to grant a new trial, alleging that the verdict was contrary to law, the instructions of the court, and the evidence, in that Itow was found guilty of first degree murder and Fushimi of manslaughter, whereas under the evidence and instructions they must have been guilty, if guilty at all, of the same degree of homicide (13).

BRIEF OF ARGUMENT.**I.****THE JURISDICTION OF THIS COURT.**

1. The introduction in evidence of Fushimi's statement raises no constitutional question as to either defendant.

(a) *As to Fushimi.*

(b) *As to Itow.*

2. No constitutional question was raised in the court below.

3. There are no other constitutional questions in the case.

4. If the court has jurisdiction as to either defendant, that fact does not confer jurisdiction as to the other.

II.**THE MERITS.**

1. The court's refusal to grant the continuance requested by defendants was within its sound discretion, and that discretion was not abused.

2. The court's permission to the jury to go at large, and its refusal to discharge the jury, were not reversible error.

(a) *Permitting the jury to separate.*

(b) *Refusal to discharge the jury.*

3. The statement of Fushimi was properly admitted.

4. The rejected instructions offered by defendants were bad.

(a) *The prayer concerning the effect of defendants' testimony.*

(b) *The prayer as to homicide committed in preventing a felony or riot or in preserving the peace.*

5. The judgment can not be reversed because the verdict was contrary to the evidence.

ARGUMENT.

I.

THE JURISDICTION OF THIS COURT.

Since neither the bill of exceptions nor the assignments of error expressly raise any question conferring jurisdiction upon this court under section 247 of the Judicial Code, and as no brief for plaintiffs in error has been filed, we are somewhat at a loss to know upon what point plaintiffs in error rest to support the jurisdiction. We shall therefore examine such of the alleged errors as might be claimed to present jurisdictional questions.

1. **The introduction in evidence of Fushimi's statement raises no constitutional question as to either defendant.**

(a) *As to Fushimi.*

If the alleged confession by Fushimi had been extorted from him under such circumstances of confinement, threats, promises, duress, or intimidation as to render it involuntary its introduction in evidence against him would be a violation of his constitutional right not to incriminate himself. (*Bram v. United States*, 168 U. S., 532.) There are several

difficulties, however, in applying that doctrine to the present case.

In the first place, Fushimi's statement was not objected to on any such ground. It was not even intimated by counsel for the defense that the statement had been improperly extorted. The objection made was an entirely different one—that it was a privileged communication. This objection clearly did not go to the constitutional right of Fushimi. So far as its involuntary character is concerned, therefore, the statement must be assumed to have gone in evidence without objection on the part of defendants.

Besides, there is nothing in the record to indicate that the statement was involuntary. The circumstances under which it was made are not related in great detail nor as fully, doubtless, as they would have been if the prosecution's attention had been directed by an appropriate objection to the present question. The circumstances which appear, however, all tend to show its voluntary character. Fushimi was not a prisoner, nor in confinement; he was merely asked to make a statement to the United States attorney, and made it. It may safely be assumed that if there had been any facts indicating extortion or the like they would have been brought to light by the defense.

(b) As to Itow.

If the statement had been introduced as evidence against Itow, it is difficult to see what constitutional right of the latter would thereby be violated. Un-

deniably, such introduction would have been erroneous. (*Sparf & Hansen v. United States*, 156 U. S., 51.) But not every error of law committed upon the trial of a criminal cause, even if prejudicial to the accused, amounts to a violation of the Federal Constitution.

In *West v. Louisiana* (194 U. S., 258) it was urged that the State court had erred in admitting in evidence against the accused a deposition, taken before the committing magistrate in the presence of the accused, of a witness then cross-examined by defendant's counsel and at the time of trial permanently absent from the State; and that such error violated the due process clause of the Fourteenth Amendment. This court dealt with that contention as follows:

There is some contrariety among the authorities and text-writers whether under the common law a deposition is admissible in such case. Assuming, however, that the State court erroneously held what the common law was on the subject, we must, in order to reverse this judgment, go further, and hold that a trial thus conducted and a deposition thus admitted did not furnish due process of law to the accused; in other words, that the refusal to exclude this deposition (an error regarding the admissibility of evidence) took away from plaintiffs in error a right of such an important and fundamental character as to deprive them of their liberty without due process of law.

The State of Louisiana had the right to alter the common law at any time, although it had theretofore adopted it with certain limitations.

If, through its courts, it erred in deciding what the common law was, yet, if no fundamental and absolutely all-important right were thereby denied to an accused, he still had due process of law and could not complain to this court regarding the error, assuming, of course, that the decision did not conflict with some specific provision of the Federal Constitution (pp. 262-263).

Twining v. New Jersey (211 U. S., 78, 110); *Standard Oil Co. v. Missouri* (224 U. S., 270, 287); *Cosmopolitan Mining Co. v. Walsh* (193 U. S., 460, 472), *accord*.

The above-quoted statement applies *mutatis mutandis* to the present situation. There is no more reason why an error of common law by a Territorial court should be held to violate the Fifth Amendment to the Constitution than why a similar error by a State court should be deemed to contravene the Fourteenth Amendment. We fail to discover any "fundamental and absolutely all-important right" of the accused which would have been violated by such error.

But in reality the evidence was not introduced against Itow, but against Fushimi alone. Nor was it objected to on any of the grounds above suggested, but merely as being prejudicial to Itow. If there were any merit in the suggestion of prejudice we know of no means of distorting it into a violation of constitutional right. What has been said above applies with even greater force here. If Itow's constitutional rights would not have been violated by

the admission of this evidence against him, *a fortiori* they were not by its admission against Fushimi.

As to both defendants the supposed constitutional questions are too insubstantial to confer jurisdiction under section 247. Where a claim asserted under the Constitution is "merely conjectural" and is not actually presented by the facts as they exist, it is not sufficient to found the jurisdiction of this court. (*Cosmopolitan Mining Co. v. Walsh*, 193 U. S., 460, 472; *Shoener v. Pennsylvania*, 207 U. S., 188, 196.) The claim must be real and substantial and not rest merely on hypothesis. (*American Sugar Refining Co. v. United States*, 211 U. S., 155, 161; *Lampasas v. Bell*, 180 U. S., 276; *Franklin v. United States*, 216 U. S., 559.)

In *United States ex rel. Brown v. Lane*, decided on March 9 of the present term, this court said upon this point:

* * * it is elementary that where the jurisdiction depends upon the presence of controversies of a particular character or the existence of prescribed questions or conditions that substance and not mere form is the test of power and therefore even in a case where the requisite for jurisdiction formally exists the right to review does not obtain where it is evident that the formal questions as presented by the record are so wanting in substance as to cause them to be frivolous and devoid of all merit.

It is apparent that the tests laid down by the above authorities are not met in the present case.

2. No constitutional question was raised in the court below.

The rule has been frequently reiterated that a constitutional question, not called to the attention of the trial court, but raised for the first time in this court, can not be relied on to invoke this court's jurisdiction; that the construction of the Constitution must have been either expressed by the court below or asked for there in order to confer jurisdiction on this court, and that the fact must appear of record. (*In re Lennon*, 150 U. S., 393, 400; *Carey v. Houston & Texas Central Ry.*, 150 U. S., 170, 181; *Ansbro v. United States*, 159 U. S., 695, 697; *Cornell v. Green*, 163 U. S., 75, 78; *Muse v. Arlington Hotel Co.*, 168 U. S., 430, 435; *Cincinnati, etc. Ry. Co. v. Thiebaud*, 177 U. S., 615, 619; *Arkansas v. Schlierholz*, 179 U. S., 598, 601; *Paraiso v. United States*, 207 U. S., 368, 370.)

It is within this court's discretion, to be sure, to consider a constitutional question which was not raised below; and occasionally that discretion has been exercised. (*Weems v. United States*, 217 U. S., 349, 362.) But the infrequency of such exercise indicates that the rule is far more prevailing than its exception.

The present case is an extreme example of neglect to raise such questions at the proper time. We have searched the record in vain to discover any suggestion of a violation of a constitutional right. Neither in the assignments of error nor elsewhere is there anything which indicates that defendants rely on any such ground of jurisdiction.

No reasons are seen for applying here the exception made in the *Weems* case. Not only have we failed to discover any constitutional questions of substance; the attempt to introduce them at this stage would work obvious hardship upon the Government. The failure of the record to show in detail the circumstances under which the alleged confession was made is an instance of this.

3. There are no other constitutional questions in the case.

No discussion of this point is required. The alleged abuse of discretion by the trial court in refusing to grant the continuance requested, in allowing the jury to go at large during the trial, and in refusing to discharge the jury at defendants' request, and the refusal of certain instructions requested by the defense—these are obviously matters which have no tinge of constitutional right about them.

An examination of the entire record leads almost irresistibly to the conclusion that the writ of error was improvidently sued out upon the assumption that writs of error in capital cases still run from this court to the district court of Alaska, even though no constitutional, treaty, or jurisdictional question be involved. But that is not so since the enactment of the Judicial Code, sections 134 and 247 having transferred jurisdiction of capital cases arising in Alaska to the Circuit Court of Appeals for the Ninth Circuit. As was pointed out on the motion to dismiss, those provisions had gone into effect before the murder was committed. For this reason it is unnecessary for us

to discuss the question whether, as Fushimi was not convicted of a capital offense (*Rakes v. United States*, 212 U. S., 55), his case could have come here along with that of Itow before the enactment of the code provision.

4. If the court has jurisdiction as to either defendant, that fact does not confer jurisdiction as to the other.

The exact question apparently has not been decided by this court in a criminal case. An analogous rule, however, obtains in civil cases, where it is held that—

where several plaintiffs claim under the same title, and the determination of the cause necessarily involves the validity of that title, this court has jurisdiction, though the individual claims do none of them exceed the requisite amount, but when the matters in dispute are separate and distinct, and are joined in one suit for convenience or economy, the case will be dismissed as to claims not exceeding \$5,000. (*Davis v. Schwartz*, 155 U. S., 631, 647.)

Similarly here, where the alleged constitutional questions in Itow's case and in that of Fushimi are separate and distinct, and where a reversal as to one need not prevent affirmance as to the other (see *Sparf & Hansen v. United States*, *supra*; *Motes v. United States*, 178 U. S., 458), it would seem that a jurisdictional question in the case of one would be ineffective to confer jurisdiction as to the other.

II.

THE MERITS.

1. The court's refusal to grant the continuance requested by defendants was within its sound discretion, and that discretion was not abused.

Section 2221 of the Compiled Laws of Alaska (Carter's Code of Criminal Procedure, sec. 112) provides:

That when an indictment is at issue upon a question of fact, and before the same is called for trial, the court may, upon sufficient cause shown by such affidavits as the defendant may produce, or the statement of the district attorney, direct the trial to be postponed to another day in the same term or to another term; and all affidavits and papers read on either side upon the application must be first filed with the clerk.

In *Hardy v. United States* (186 U. S., 224) it was held—

That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question. (Citing *Goldsby v. United States*, 160 U. S., 70; *Isaacs v. United States*, 159 U. S., 487, 489, and authorities there cited.)

This case arose under this identical provision of the Alaska Code. It is too late, therefore, to doubt that the section confers the usual discretion upon the trial court in the matter of continuance. (*Pickett v.*

United States, 216 U. S., 456, 461; *Franklin v. South Carolina*, 218 U. S., 161, 168.)

There is no ground for asserting that this discretion was abused in the instant case. The circumstances heretofore outlined show that defendants' counsel had not used due diligence in summoning witnesses; that although defendants were indicted on December 13 and had been committed nearly five months previous, no attempt was made to obtain process for witnesses until December 20. Under these circumstances the court was justified, in view of the condition of its docket (20), in commencing the trial upon the date set.

Defendants suffered no prejudice from this ruling. The court granted two continuances of two days each pending the arrival of the witnesses, and the only difference made by its refusal to grant the continuance requested was that defendants' counsel was unable to see his witnesses before the trial commenced and thus to make an opening statement. This was at least as prejudicial to the Government as to the defense (95). The conclusion is inevitable that counsel refused to make this opening statement in order to preserve the exception on the record, feeling that he could do so without materially affecting his clients' chances. The immateriality of the matter to his mind is shown by his failure to renew the suggestion that he might make his statement at the commencement of defendants' case instead of at the beginning of the trial, although the court had not ruled upon it.

2. The court's permission to the jury to go at large, and the refusal to discharge the jury, were not reversible error.

(a) *Permitting the jury to separate.*

Section 2247 of the Compiled Laws of Alaska (Carter's Code of Criminal Procedure, sec. 138) provides:

That when a case is finally submitted, the jurors must be kept together in some convenient place under the charge of an officer until they agree upon a verdict or are discharged by the court; * * * and if the jurors be permitted to separate during the trial, they shall be admonished by the court that it is their duty not to converse with, nor to suffer themselves to be addressed by, any person, nor to listen to any conversation on the subject of the trial, nor to form or express an opinion thereon, until the case is finally submitted to them.

The language of this provision seems to leave it to the discretion of the trial court whether or not to keep the jury together during the trial. The section is taken literally from section 7312 of Bates' Annotated Ohio Statutes. Under that section it has been held that the matter is discretionary with the trial court even in capital cases. (*Bergin v. State*, 31 Ohio St., 114, and cases cited.)

Under section 198 of Hill's Annotated Code of Oregon, apparently in force in Alaska before the adoption of the code of 1899, the matter was expressly left to the discretion of the court, and this is held to apply in capital cases. (*State v. Shaffer*, 23 Oreg., 555.)

This is a generally accepted rule. (Clark, Crim. Pro. 478; *Armstrong v. Oklahoma*, 24 L. R. A. (N. S.), 776 and note; *Holt v. United States*, 218 U. S., 245, 251.)

Clearly there was no abuse of discretion in the present case. As we have seen, the court took the utmost pains to instruct the jury in great detail concerning their duty not to listen to conversations upon the subject of the trial. The jury were permitted to separate by the express consent of counsel for the defendants as well as the United States attorney, the latter subsequently taking oath that this was done in order to get a better class of men on the jury (181). It would be a triumph of double-dealing to allow defendants to obtain a reversal on any such ground as this.

(b) *Refusal to discharge the jury.*

In *Mattox v. United States* (146 U. S., 140, 150) this court reversed the trial court for its failure to consider affidavits stating that a newspaper account of the trial highly prejudicial to the defendant had been read to the jury. The effect of the *Mattox* case is explained in *Holmgren v. United States* (217 U. S., 509, 522), where it is said:

To the like effect is *Mattox v. United States*, 146 U. S. 140, where the court below refused to entertain affidavits showing the reading of a newspaper, containing an unfavorable article, during the deliberations of the jury, and also damaging remarks of an officer in charge of the jury during the progress of the trial. In both cases the basis of the action of the re-

viewing court was the refusal of the courts below to exercise the discretion vested in them by law.

Here there was no such failure to exercise the discretion vested in the trial court.

However, the question is hardly open to discussion since the decision in *Holt v. United States* (218 U. S., 245). There the identical question arose. This court, through Mr. Justice Holmes, stated the circumstances and the appropriate rule of law as follows:

We will take up in this connection another matter not excepted to but made one of the grounds for demanding a new trial, and also some of its alleged consequences, because they also involve the question how far the jury lawfully may be trusted to do their duty, when the judge is satisfied that they are worthy of the trust. The jurymen were allowed to separate during the trial, always being cautioned by the judge to refrain from talking about the case with anyone and to avoid receiving any impression as to the merits except from the proceedings in court. The counsel for the prisoner filed his own affidavit that members of the jury had stated to him that they had read the Seattle daily papers with articles on the case while the trial was going on. He set forth articles contained in those papers, and moved for a new trial. The court refused to receive counter affidavits, but, assuming in favor of the prisoner that the jurors had read the articles, he denied the motion. This court could not make that assumption if

the result would be to order a new trial, but the probability that jurors, if allowed to separate, will see something of the public prints is so obvious, that for the purpose of passing on the permission to separate it may be assumed that they did so in this case.

We are dealing with a motion for a new trial, the denial of which can not be treated as more than matter of discretion or as ground for reversal, except in very plain circumstances indeed. *Mattox v. United States*, 146 U. S. 140. See *Holmgren v. United States*, 217 U. S. 509. It would be hard to say that this case presented a sufficient exception to the general rule. The judge did not reject the affidavit, but decided against the motion on the assumption that more than it ventured to allege was true. As to his exercise of discretion, it is to be remembered that the statutes or decisions of many States expressly allow the separation of the jury even in capital cases. Other States have provided the contrary. The practice has varied, with perhaps a slight present tendency in the more conservative direction. If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day. Without intimating that the judge did not go further than we should think desirable on general principles, we do not see in the facts before us any conclusive ground for saying that his expressed belief that the trial was fair and that the prisoner has nothing to complain of is wrong (pp. 250-251).

That was a much stronger case for the defendant than is this. There it was assumed that the jurors had read the articles dealing with the case; here the trial judge was satisfied that they had not. There is nothing in the record to suggest that the court was misled in this matter. Counsel did not attempt to prove by affidavit or otherwise that a single member of the jury had read the article, but contented himself with the general statement (not sworn to) in his motion for a new trial that defendants believed the United States attorney gave out the interview to prejudice their case (177). This not only is denied by the United States attorney's affidavit and that of the newspaper man who was responsible for the story, but is unsupported by a single shred of evidence in the record.

It might be suggested that defendants in the present case are in a better position than the prisoner in the *Holt* case in that here the objection was made and exception taken at once, while there it was merely alleged as a ground for demanding a new trial. There is nothing in this distinction. Section 2248 of the Compiled Laws of Alaska (Carter's Code of Criminal Procedure, sec. 139) provides:

That the court may discharge a jury without prejudice to the prosecution for the sickness of a juror, the corruption of a juror, or other accident or calamity, or because there is no probability of the jurors agreeing, and the reason for the discharge shall be entered on the journal.

Assuming that the influencing of the jury by adverse newspaper comment might be deemed an "accident or calamity," and so within the purview of this section, it is evident that the propriety of such discharge, like the granting of a new trial, is left to the discretion of the trial court. This is the accepted rule. (*Usborne v. Stephenson*, 48 L. R. A., 432, 434, *note*.)

Since no abuse of that discretion has been shown, there is no question involved for this court to review.

3. The statement of Fushimi was properly admitted.

Where defendants are jointly tried for a single offense, a previous statement made by one of them since the commission of the offense is admissible against him, even though not against the other defendant or defendants who were not present when the statement was made. (*Sparf & Hansen v. United States*, *supra*; *United States v. Ball*, 163 U. S., 662; *Fitzpatrick v. United States*, 178 U. S., 304. See also cases cited in Government's brief in *Apapas v. United States*, p. 22 (No. 746, this term). In the *Sparf & Hansen* case the conclusion of this court was:

We are of opinion that as the declarations of Hansen to Sodergren were not, in any view of the case, competent evidence against Sparf, the court, upon objection being made by counsel representing both defendants, should have excluded them as evidence against him, and admitted them against Hansen (p. 58).

In the *Ball* case this court said, at page 672:

These two defendants moved that they be tried separately from Millard F. Ball, because he had been previously acquitted; because the government relied on his acts and declarations made after the killing and not in their presence or hearing; and because he was a material witness in their behalf. But the question whether defendants jointly indicted should be tried together or separately was a question resting in the sound discretion of the court below. *United States v. Marchant*, 12 Wheat. 480. It does not appear that there was any abuse of that discretion in ordering the three defendants to be tried together, or that the court did not duly limit the effect of any evidence introduced which was competent against one defendant and incompetent against the others. See *Sparf v. United States*, 156 U. S. 51, 58. On the contrary, upon the offer by the United States of evidence of declarations made by Millard F. Ball after the killing and not in the presence of the other defendants, and upon an objection to its admissibility against them, the court at once said, in the presence of the jury, that, of course, it would be only evidence against him, if he said anything; *and the court was not afterwards requested to make any further ruling upon this point.*

It may be suggested that the court might well have instructed the jury specifically not to regard the statement as evidence against Itow; and such an instruction would undoubtedly have been appro-

priate. But the United States attorney, in introducing the confession, reiterated the assertion that it was offered as evidence only against Fushimi (100-101); the jury could therefore have been left in no doubt as to their duty in the premises. Besides, the suggestion that the court's failure to give specific instruction upon this point was error is answered by the passage above quoted from the Ball case. Here, as there, no instruction upon this point was asked; and it is a settled rule of practice that error can not be assigned to a failure to give an instruction not requested. (*Isaacs v. United States*, *supra*, 491; *Humes v. United States*, 170 U. S., 210.)

The objection on the part of Fushimi was that his statement to the district attorney was privileged.

Counsel evidently had in mind the familiar rule of criminal evidence—applied by this court in *Vogel v. Gruaz* (110 U. S., 311)—that a complaint to a prosecuting attorney of the commission of crime is a privileged communication. Even if this were such a disclosure, the privilege is that of the Government, not of the informer. (*Vogel v. Gruaz*, *supra*, 316.)

But the doctrine of confidential communications is not applicable. Fushimi made no charge of crime. The district attorney was examining a number of witnesses to ascertain the true facts of the homicide. Each witness could refuse to talk only on the ground of self-incrimination. It is now too late to add to that constitutional protection another rule that any voluntary statement by a

criminal can not be used if it happens to be made to an officer of the law.

Again, the substance of Fushimi's statement, in contradiction to his testimony, was contained in an affidavit made jointly by both defendants on their application for the summoning of witnesses. This affidavit was put in evidence to contradict them (158).

4. The rejected instructions offered by the defendants were bad.

As before stated, one of these instructions, the refusal of which is assigned as error, was in fact given in terms by the court as No. 4 (13, 161, 163).

Of the prayers refused, the first related to the weight to be given to the defendants' testimony and the other to a homicide committed in preventing a felony or suppressing a riot (161-162).

As offered, both were erroneous. The law covering the different theories of the case was fully explained to the jury.

(a) The prayer covering the testimony of the defendants (161) was given to the jury in substance. See instructions 29 to 32 and 36 (173-175). The court omitted from the instruction the following:

In a case of this kind you should determine whether that statement [of the defendants] is corroborated substantially by proven facts; if so it is strengthened to the extent of its corroboration. If it is not so strengthened in that way you are to weigh it by its own inherent truthfulness.

It was erroneous to refer to corroboration without mentioning contradiction; the suggestion was that the testimony was strengthened in the one case, but was not weakened in the other.

(b) The other instruction which was refused is:

You are instructed that the killing of a human being is justifiable when committed to prevent the commission of a felony upon the person of the slayer or upon his servant or in the lawful attempt to suppress a riot or preserve the peace. So in this case if you find and believe from the evidence that the deceased, Frank Dunn, was attempting to commit a felony upon the persons of Nakayama and Fushimi, and that Itow was the foreman in charge of said Nakayama and Fushimi, and that in the attempt on the part of Itow to prevent the commission of such felony, the deceased was killed; or if you have a reasonable doubt as to whether the deceased did not lose his life in that way then you must acquit.

It would also be your duty to acquit if you believe that at the time Itow reached the scene of the fatality there was a riot in progress or a breach of the peace was taking place and Itow was making a lawful attempt to suppress such a riot or preserve the peace or if you have a reasonable doubt as to whether the killing did not so occur in either case the defendants are not guilty. (R., 13.)

There were no facts in evidence, and no theory was advanced on either side warranting such an instruc-

tion. It was therefore properly refused. (*Bird v. United States*, 187 U. S., 118, 132.)

According to the testimony for the Government, the killing of Dunn was a wanton and premeditated murder by Itow; while the evidence of the defendants tended to show that it was purely accidental. The defense denied that Itow killed Dunn intentionally, either in self-defense or to prevent the commission of a crime by Dunn.

While the prayer is inartificially drawn and is broad enough to cover both an accidental and an intentional killing happening in an affray, it is clearly directed to an intentional killing in self-defense or to prevent a breach of the peace. This theory of the prayer was utterly inconsistent with defendants' testimony (of accidental killing), and for that reason was properly rejected. (*Fearson v. United States*, 10 App. Cas., D. C., 536, 539.)

Aside from this inconsistency, the prayer is bad for many reasons.

There was no evidence that Dunn was attempting to commit a felony. Fushimi's claim was that Dunn had assaulted him. This was a simple assault punishable by imprisonment for not more than six months (Comp. Laws of Alaska, sec. 1905), and therefore not a felony (*ibid*, sec. 2065). There was no riot; three men were fighting, which was an affray at the most. There was no evidence that Itow attempted to prevent a felony or breach of the peace or suppress a riot. Itow claimed that he went to

the China House to protect his men, but no fighting was going on when he got there.

A "lawful" attempt to suppress a riot was not defined. Here is the real vice of the instruction. It is a practical statement that Itow was justified in killing Dunn in order to stop a fist fight between him, Fushimi, and Nakayama, even though Dunn was acting in self-defense and the fight might have been stopped in a less drastic way.

The essential qualification that the killing must be necessary, and that the violation of the law can not otherwise be suppressed, is omitted from the prayer. (Clark & Marshall, *Crimes* (2d ed.), pp. 383-385.)

The instructions actually given by the court fully stated the law applicable to the facts (18, 19, pp. 169, 170).

5. The judgment can not be reversed because the verdict was contrary to the evidence.

This has been asserted too often to require argument. (*Humes v. United States*, *supra*; *Crumpton v. United States*, 138 U. S., 361; *Moore v. United States*, 150 U. S., 57, 61; *Johnson v. United States*, 228 U. S., 457, 459.)

The point of this objection is that one defendant was convicted of murder in the first degree and the other of manslaughter.

True, the jury might have found both defendants guilty of murder in the first degree. But there was ample evidence to justify their conclusion. If Itow

purposely, and after deliberation and premeditation, killed Dunn, the verdict as to him was correct.

But if Fushimi himself had no purpose to kill, and did not know of Itow's intention to kill, he would be guilty of murder in the second degree at the most. And if the jury believed—finding some truth in the testimony on both sides—that Dunn struck Fushimi and knocked him down, and that Fushimi in the heat of passion resulting from the blow aided in the killing, their verdict of manslaughter was justified.

The verdict of guilty in different degrees is therefore perfectly proper.

Brown v. State, 28 Ga., 199, 213.

Wharton on Homicide (3d ed.), sec. 440.

However, the matter arises on motion for a new trial. The action of the trial court on such motion is not assignable as error.

Pickett v. United States, 216 U. S., 456.

Bucklin v. United States, 159 U. S., 682.

Holmgren v. United States, 217 U. S., 521.

CONCLUSION.

The writ of error should be dismissed for want of jurisdiction, or the judgment below affirmed.

JESSE C. ADKINS,

Assistant Attorney General.

KARL W. KIRCHWEY,

Attorney.

APRIL, 1914.



ITOW AND FUSHIMI *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES,
DIVISION NO. I, TERRITORY OF ALASKA.

No. 714. Argued April 8, 1914.—Decided May 11, 1914.

Judicial Code, § 134, governing the right to review cases in the District of Alaska, changed the general rule of the prior law by taking capital cases out of the class which could come to this court directly because they were capital cases and by bringing such cases within the final reviewing power of the Circuit Court of Appeals of the Ninth Circuit. Under § 247, Judicial Code, this court has power to review directly the action of the District Courts of Alaska practically in the same classes of cases as were provided in § 5 of the Judiciary Act of 1891. As the record in this case does not show that any reliance was placed,

or that any exceptions were based, on the Constitution in the court below, the assignments are inadequate to give this court jurisdiction of a direct appeal from the District Court for Alaska in a capital case. Although under §§ 134 and 247, Judicial Code, the right to direct review on a constitutional question is confined to cases where the question was raised in the court below, this court still has power to pass upon the question either by certificate from the Circuit Court of Appeals or by certiorari from this court, if in its judgment the question was of sufficient importance to warrant issuing the writ.

THE facts, which involve the jurisdiction of this court to review judgments of the District Courts of Alaska in capital cases and the construction of § 134, Judicial Code, are stated in the opinion.

Mr. Assistant Attorney General Adkins, with whom The Solicitor General and Mr. Karl W. Kirchwey were on the brief, for the United States.

Mr. J. H. Cobb, for plaintiffs in error, submitted.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

By an indictment found in the court below on the thirteenth of December, 1912, the plaintiffs in error, Itow and Fushimi, were charged with having murdered one Frank Dunn, on the fourteenth day of July, 1912, and to a verdict of murder and sentence of death against Itow and of manslaughter and sentence of 20 years imprisonment against Fushimi this direct writ of error is prosecuted.

The Government moves to dismiss for want of jurisdiction and at the threshold that motion requires to be disposed of. The crime charged was committed after the enactment of the Judicial Code and there is no question as to the applicability of its relevant provisions. By § 134 of

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that Code governing the right to review cases in the district of Alaska or any division thereof, power is conferred on the Circuit Court of Appeals of the Ninth Circuit to review, and its judgments in such cases are made final, all cases including all criminal cases "other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in Section two hundred and forty-seven." It is obvious that this section changed the general rule of the prior law by taking capital cases out of the class which could come because they were capital cases directly to this court, and by bringing such cases within the final reviewing power of the Circuit Court of Appeals of the Ninth Circuit.

Section 247 which, as pointed out in § 134, defines the cases which are excepted from the general rule provided by § 134, gives authority to this court to directly review the action of the District Courts of Alaska "in prize cases; and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

These provisions being but a reëxpression of the language by which the subject of direct review by this court was governed as provided in the fifth section of the Judiciary Act of March 3, 1891 (c. 517, 26 Stat. 826, 827), the settled meaning which was affixed by the decisions of this court to the provisions as found in the act of 1891 necessarily determine the significance of the provisions of the section under consideration.

In *Ansbro v. United States*, 159 U. S. 695, where it became necessary in a criminal case to determine whether there was a right to come directly to this court from a Circuit Court of the United States in virtue of the

provisions of the fifth section of the act of 1891, the court, speaking through Mr. Chief Justice Fuller, said (p. 697):

"The jurisdiction of this court must be maintained then, if at all, on the ground that this is a case 'that involves the construction or application of the Constitution of the United States,' or 'in which the constitutionality of any law of the United States is drawn in question.' But we cannot find that any constitutional question was raised at the trial. Motions to quash, to instruct the jury to find for the defendant, for new trial, and in arrest of judgment were made, but in neither of them, so far as appears, nor by any exception to rulings on the admission or exclusion of evidence, nor to instructions given or the refusal of instructions asked, was any suggestion made that defendant was being denied any constitutional right or that the law under which he was indicted was unconstitutional. The first time that anything appears upon that subject is in the assignment of errors, filed February 13, 1895.

"A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. . . . An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the 5th section of the act of March 3, 1891 (c. 517, 26 Stat. 826, 827)."

And the doctrine thus announced has been followed and applied in many cases. *Cornell v. Green*, 163 U. S. 75, 79, 80; *Muse v. Arlington Hotel Co.*, 168 U. S. 430, 435;

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Cincinnati &c. R. Co. v. Thiebaud, 177 U. S. 615, 619;
Paraiso v. United States, 207 U. S. 368.

The assignments of error relate to these subjects:
1. Error asserted to have been committed by the court in refusing to allow a continuance pending the arrival of certain witnesses, thereby it is asserted "denying the defendant the right to have their counsel make an opening statement to the jury." 2. Error committed by the court in permitting the jury, with the consent of the accused, to separate after they were selected and empanelled and sworn. 3. Error by the court in refusing to discharge the jury because of an alleged publication made in a local newspaper during the trial, although the refusal of the court was based upon its opinion formed after a statement by the jurors that they had not seen the publication referred to. 4. Error committed by the court in admitting in evidence against Fushimi a statement made by him concerning the crime.

But in the light of the settled rule which we have stated it is apparent on the face of the record that the assignments are wholly inadequate to give us the power to directly review since there is nothing whatever directly or indirectly even intimating that the reliance on the Constitution was stated at the trial below in any form.

It may be fairly presumed under these circumstances that the direct writ of error from this court was sued out overlooking the fact that by operation of the Judicial Code the general right to direct review in capital cases was taken away or that the writ was prosecuted upon the assumption that the right to a direct review existed in any case where it was possible in this court to argue as to the existence of a constitutional right, wholly irrespective of whether the constitutional question relied upon was raised and considered in the lower court. But the latter conception overlooks the conclusively settled rule to which we have referred that the power to directly review

because of a constitutional question obtains only where such question was involved in the trial court, that is, was there actually raised. The destructive effect on the distribution of judicial power made by the act of 1891 which would result from holding that jurisdiction to directly review obtained in any case because of a constitutional question irrespective of the making of such question in the trial court merely because of the possibility after completion of the trial below of suggesting for the first time such question as the foundation for resorting to direct review, is apparent and finds apt illustration in this case. Thus, although the accused made no objection, constitutional or otherwise, to the permission given by the court to the jury to separate, and indeed expressly assented to such separation, yet as one of the grounds for direct review by this court it is insisted that as the Constitution guaranteed a jury trial according to the course of the common law and permission to separate could not be granted under that law, therefore the accused was deprived of a constitutional right.

It is to be observed that confining the right to direct review because of a constitutional question to cases where such question was raised in the trial court, that is, was there involved, does not deprive this court of the ultimate power to pass upon constitutional questions where it is necessary to do so, since if such a question not raised in the trial court germinates or emerges in a Circuit Court of Appeals, the right of that court to certify affords an opportunity of obtaining a review of the question by this court, and in the absence of a certification of the question the authority of this court to grant a writ of certiorari would enable the same result to be accomplished if in the judgment of this court the constitutional question was of sufficient importance to justify the calling into play of that power.

Dismissed for want of jurisdiction.